TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 230

NEW YORK CENTRAL RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

NEW YORK & PENNSYLVANIA COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED DECEMBER 27, 1924

(30,756)

(30,756)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 791

NEW YORK CENTRAL RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

NEW YORK & PENNSYLVANIA COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

INDEX

	Original	Print
Record from common pleas court of Clinton County	1	1
Docket entries	1	1
Sheriff's return to summons	1	1
Order to show cause	2	2
Order for judgment	2	2
Judgment	3	2
Judgment from supreme court	4	3
Clerk's certificate	5	3
Praecipe for summons	6	4
Statement of claim	7	4
Exhibit A—Report of public service commission	12	7
Exhibit B—Order of commission to file tariff schedules	21	12
Exhibit C—Order amending order to file schedules	22	13
Exhibit D—Order denying petition for rehearing	23	13
Exhibit E—Supplemental report and order	24	14
Exhibit F—Report of commission	26	15
Exhibit G—Order No. 1 of commission	32	19

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	Original	Print
Exhibit H—Order No. 2 of commission	33	20
Summons and sheriff's return	35	21
Appearances of counsel	36	22
Affidavit of defense of New York Central R. R. Co.	38	22
Exhibit A—Report of Interstate Commerce Commission in case of New York & Pennsylvania Company vs. Director General, as agent, etc.	46	27
Affidavit of defense of Pennsylvania R. R. Co.	55	32
Exhibit A—Report of Interstate Commerce Commission in case No. 11729 (copy)....(omitted in printing)	62	36
Order to show cause (copy).....(omitted in printing)	71	36
Reasons in support of motion for judgment against the Pennsylvania R. R. Co.	72	36
Reasons in support of motion for judgment against the New York Central R. R. Co.	75	38
Opinion, Baird, J.	78	39
Bond on appeal.....(omitted in printing)	92	47
Proceedings in supreme court of Pennsylvania	96	47
Writ of certiorari	96	47
Order enlarging time	97	48
Order to hold record	98	48
Docket entries	99	49
Appeal and affidavit	102	51
Notice of appeal	103	52
Assignments of error	104	52
Order enlarging time	109	56
Petition for reargument	112	56
Answer to petition for reargument	135	68
Opinion, Sadler, J.	139	70
Motion and order to hold record	149	75
Petition for reargument	152	76
Order for return of record	191	95
Petition for writ of error	193	95
Assignments of error	201	99
Order allowing writ of error	205	101
Writ of error	206	101
Citation and service.....(omitted in printing)	208	102
Bond on writ of error.....(omitted in printing)	209	102
Præcipe for transcript of record	211	102
Clerk's certificate	212	103
Judge's certificate to clerk	213	103
Clerk's certificate to judge	213	104

[fol. 1] **IN COMMON PLEAS COURT OF CLINTON COUNTY, JANUARY TERM, 1923**

Docket Entries

No. 5

THE NEW YORK AND PENNSYLVANIA COMPANY, a Corporation of the State of Pennsylvania,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation of the State of New York, and The Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania.

B. F. Geary.
Parker McCollester and McCormick & Hipple.
Henry Wolfe Bikle and McCormick & Hipple.

Summons in Assumpsit, returnable the fourth Monday of November, 1922, issued October 19, 1922.
October 19, 1922.—Statement of Plaintiff's Claim filed.
October 19, 1922.—2 certified copies of Plaintiff's Claim issued to the Sheriff.

SHERIFF'S RETURN TO SUMMONS

Now, Oct. 21, 1922, served the within Summons in Assumpsit, together with Statement of Claim upon the New York Central Railroad Co., a corporation, by handing true and correct copies of the within Writ to I. H. Kennedy, its Agent, at its Station at Castanea, Clinton County, Pa., and making known to him the contents thereof upon inquiry thereat, the residence of the President, Secy., Treas., Cashier, Chief Clerk, or other Executive officers, was not to be found in the County of Clinton.

Same day served same Writ upon the Penna. Railroad Company, a corporation, by handing true and correct copies of the within Writ to D. R. Goodlander, its Agent, at its Station, Lock Haven, Clinton County, Pa., and making known to him the contents thereof upon inquiry thereat the residence of the President, Secretary, Treasurer, Cashier, Chief Clerk or other Executive officer was not found in the County of Clinton.

So ans.—

Tom Johnston, Sheriff.

Nov. 27, 1922.—Appearance of Parker McCollester, McCormick & Hipple, for New York Central Railroad Co. filed.
Nov. 27, 1922.—Appearance of Henry Wolfe Bikle, McCormick & Hipple, for Pennsylvania Railroad Co. filed.

[fol. 2] Nov. 27, 1922.—Affidavit of Defense of New York Central Railroad Co. filed.

Nov. 27, 1922.—Affidavit of Defense of Pennsylvania Railroad Co. filed.

Dec. 14, 1922.—Motion for Judgment filed.

ORDER TO SHOW CAUSE

And now, to-wit, Dec. 14, 1922, on motion of Thomas Raeburn White and B. F. Geary, Attys. for Plaintiff, a Rule is granted on Defendants above named to show cause why judgment should not be entered in favor of the Plaintiff and against the Defendants for want of a sufficient Affidavit of Defense. Returnable fourth Monday of January, 1923.

By the Court,

E. H. Baird, P. J.

12/16/1922.—Service accepted and issuing of the Rule waived. McCormick & Hipple and M. E. Haggerty, Attorneys for Deft.

Jan. 8, 1923.—Reasons in support of motion for Judgment filed.

Jan. 8, 1923.—Reasons in support of motion for Judgment filed.

Jan. 8, 1923.—Service of within Reasons in support of motion accepted.

McCormick & Hipple, Attorneys for Defendants.

July 23, 1923.—Opinion of the Court filed.

ORDER FOR JUDGMENT

Now, July 23, 1923, the rule to show cause, heretofore granted is [fol. 3] made absolute, and the Prothonotary is directed to enter Judgment accordingly, amount to be liquidated by him.

By the Court,

E. H. Baird, P. J.

Now, July 23, 1923, the defendants excepts to above order, and at their request a Bill is sealed.

By the Court,

E. H. Baird, P. J.

JUDGMENT

And now, July 23, 1923, by the direction of the Court Judgment is entered in favor of the Plaintiff and against the Defendants for the sum of Six Thousand Five Hundred Forty-six 43/100 Dollars as follows:

Principal	6,172.97
Interest from July 20, 1922, to July 23, 1923	373.46
Real debt	$6,546.43

Entered July 23, 1923, Judgment $6,546.43.

L. D. Geo. G. Hickoff, Prothy.

Aug. 8, 1923.—Bond on Appeal in the sum of $14,000 filed.
Aug. 8, 1923.—The within bond approved. George G. Hickoff, Prothy.
Aug. 11, 1923.—Certiorari to the Supreme Court filed.
[fol. 4] May 5, 1924.—Remittitur from Supreme Court filed.

And it was so proceeded in our Supreme Court that the following was made to-wit:

JUDGMENT OF SUPREME COURT

The Judgment is affirmed and the record proceedings thereupon and all things concerning the same were agreeably to the direction of the Act of Assembly in such case made and provided, ordered by the said Supreme Court to be remitted to the Court of Common Pleas, for the County of Clinton aforesaid, as well for execution or otherwise as to Justice shall appertain, wherefore we here remit you the Record of the Judgment aforesaid, and the proceedings thereupon, in order for execution or otherwise as aforesaid.

Witness the Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our Supreme Court at Philadelphia, first day of May in the year of our Lord, (1924).

Thomas Robbins, Pro.

May 13, 1924.—On receipt of telegram returned the Record.
May 14, 1924.—Certificate of Order for Return of Record filed.
July 22, 1924.—Remittitur filed, and Opinion of Court filed.

The Judgment is affirmed.

Witness the Hon. Robert von Moschzisker, Doctor of Law, Chief Justice of our said Supreme Court at Philadelphia, the 19th day of July, 1924;

Thomas Robins, Prothy.

August 1, 1924.—On receipt of order returned the Record to Prothonotary of Supreme Court, Philadelphia, Pa.
Record received, October 14, 1924.
Oct. 20, 1924.—Order to Return Record filed.
Oct. 20, 1924.—Record returned by registered mail.

[fol. 5] IN COMMON PLEAS COURT OF COUNTY OF CLINTON

CLERK'S CERTIFICATE

I, Geo. G. Hickoff, Prothonotary of the Court of Common Pleas, in and for the County of Clinton, and State of Pennsylvania, do hereby certify that the above and foregoing pages contain a true copy and correct transcript of the Record and proceedings in the said cause,

so full and entire as the same remains of record in my office, entered in Appearance Docket No. 27, to No. 5 January Term, 1923, in the Court of Common Pleas of Clinton County, Pa.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of said Court, this Twenty-fourth day of December, A. D. 1924.

Geo. G. Hickoff, Prothonotary. (Seal.)

[fol. 6] IN COURT OF COMMON PLEAS OF CLINTON COUNTY

[Title omitted]

PRECIPE FOR SUMMONS—Filed October 19, 1922

Issue summons in assumpit, returnable to fourth Monday of Nov., 1922.

Damages, —.

To Geo. G. Hickoff, Esq., Prothonotary.

T. R. White, B. F. Geary, Attorneys for Plaintiff.

[File endorsement omitted.]

IN COURT OF COMMON PLEAS OF CLINTON COUNTY

[Title omitted]

STATEMENT OF CLAIM—Filed Oct. 19, 1922

Plaintiff, New York and Pennsylvania Company, a corporation of the State of Pennsylvania, having its principal office and place of business at Lock Haven, Clinton County, Pennsylvania, claims of defendants, The New York Central Railroad Company, a corporation of the State of New York, and The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, the sum of Six thousand one hundred seventy-two Dollars and ninety-seven Cents ($6,172.97), with interest from July 20, 1922, which sum is justly due and payable to the plaintiff by the defendants upon a cause of action whereof the following is a statement:

1. Plaintiff is a large consumer of bituminous coal which is shipped to it from the Munson and Hawk Run Districts in Central Pennsylvania, over the lines of the defendant, The New York Central Railroad Company to Bald Eagle Junction, Pennsylvania (otherwise known as Mill Hall), and thence over the lines of defendant, The Pennsylvania Railroad Company to Lock Haven, Pennsylvania, where plaintiff's mills are located.

[fol. 8] 2. On and prior to February 29, 1920, the freight rates charged and collected by defendants on coal so shipped, according to their tariffs duly filed, consisted of a rate of 70c per ton of 2,240

pounds, charged by the defendant, The New York Central Railroad Company, for the movement from the mines to Bald Eagle Junction, and a rate of 40c per ton charged by the defendant, The Pennsylvania Railroad Company, for the movement from Bald Eagle Junction to Lock Haven, making a through rate of $1.10 per ton for the total movement.

3. On and prior to February 29, 1920, the lines of the defendants were under Federal control, pursuant to the Acts of Congress in such case made and provided, and on March 1, 1920, pursuant to the terms of an Act of Congress, known as the "Transportation Act 1920," particularly section 208 (a), Federal control terminated and the lines of railroads were restored to the defendants, their owners.

4. Prior to March 1, 1920, the plaintiff filed a complaint with the Public Service Commission of the Commonwealth of Pennsylvania against the rates above described, alleging that they were, and upon re-establishment of State authority thereover would be unjust, unreasonable, excessive, discriminatory and in violation of the Public Service Company Law of the Commonwealth of Pennsylvania.

5. On August 25, 1920, while said proceedings were pending and undetermined, pursuant to general increases which were then permitted, and by tariffs duly filed, defendants increased the joint rate for said transportation of coal from $1.10 to $1.54 per ton, which thereafter was charged and collected.

6. Answers were duly filed by the defendants to said complaint, hearings were had, and the Commission made its report on August [fol. 9] 17, 1921, and entered orders on August 16, 1921, and August 29, 1921, wherein and whereby it found and ordered that the just and reasonable rate for said through movement of coal for the period from March 1, 1920, to August 25, 1920, was $1.00 instead of $1.10 per ton, and that the just and reasonable rate effective August 26, 1920, was $1.40 instead of $1.54 per ton. Said Commission held that the rates aforesaid, to the extent that they exceeded the rates so found to be reasonable, were unjust, unreasonable, excessive and contrary to law. Thereafter defendants filed a petition for a re-hearing, which was in due course refused. Copies of the report and orders of the Commission in the premises are hereto attached and made a part hereof, marked Exhibits "A", "B", "C", "D" and "E."

7. Plaintiff avers that the rates charged as aforesaid, viz: $1.10 from March 1, 1920, to August 25, 1920, inclusive, and $1.54 after August 26, 1920, were unjust, unreasonable, excessive, discriminatory and in violation of the Public Service Company Law of the State of Pennsylvania, to the extent aforesaid.

8. No appeal was taken by the defendants from the said report and orders or any of them.

9. Between March 1, 1920, and August 31, 1920, both inclusive, there was shipped to plaintiff over defendants' lines as aforesaid 54,830.34 gross tons of coal, for the transportation of which plaintiff paid defendants freight in excess of reasonable rates as aforesaid in

the amount of $5,484.41, and during the period from August 31, 1920, until November 3, 1921, when the reduced rates became effective by the order of the Commission, 119,406.87 gross tons, for the transportation of which plaintiff paid defendants $16,708.40 in ex-
[fol. 10] cess of said reasonable rates. Plaintiff and defendants agreed upon these amounts and there is no dispute concerning them.

10. Plaintiff consumed all of the coal so shipped to it on which said excess charges were paid, and did not pass on to any other person or corporation the loss sustained by reason of its having paid said unlawful rates.

11. Plaintiff duly filed its petition for reparation for the excess payments on coal moving as aforesaid (P. S. C. Docket No. 4738); answers were filed by defendants, and the case was so proceeded with that on June 20, 1922, two orders were promulgated by the Commission, one directing the defendants to pay to plaintiff reparation for excess charges on shipments moving between March 1, 1920, and August 31, 1920, in the amount of $6,172.97 (interest having been added), and one for the period from September 1, 1920, to November 3, 1921, the sum of $17,978.17. Copies of the report and orders of the Commission are hereunto annexed and made a part hereof, marked Exhibit "F," "G" and "H."

12. Defendants paid Order No. 2 covering reparation in the amount of $17,978.17.

13. Order No. 1, directing defendants to pay the plaintiff the sum of $6,172.97, was duly served on the defendants as indicated by their acceptance of service on file with the Public Service Commission, dated July 5, 1922, but they have failed and refused to pay the said order or any part thereof.

Wherefore, plaintiff claims the sum of $6,172.97, with interest from July 20, 1922.

(Signed) B. F. Geary, T. R. White, Attorneys for Plaintiff.

[fol. 11] Jurat showing the foregoing was duly sworn to by E. L. omitted in printing.

[fol. 12] EXHIBIT "A" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY

Report of the Commission

By the COMMISSION:

This complaint is directed against the rate on Bituminous Coal in carloads, from the Munson District and Hawk Run District in Central Pennsylvania on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad, as published in Supplement No. 7 to New York Central Railroad Joint, Local and Proportional Coal Tariff No. 553, P. S. C., Pa., N. Y. C., No. C-38, and Pennsylvania Railroad Local Tariff, C. & C., P. S. C., Pa., No. 783. The former publishes 70 cents per 2,240 pounds to Bald Eagle Junction (proportional) for Lock Haven, Pa., deliver, subject to the following note:

"This proportionate rate to Bald Eagle Junction, Pa., applies only on shipments for delivery to Pennsylvania R. R., at Bald Eagle Junction, Pa., for movement by that company to Lock Haven, Pa., via Pennsylvania R. R., to which point no through rates are published. Freight charges must be prepaid except when arrangements are made for collection at final destination."

The tariff of the Pennsylvania Railroad publishes 40 cents per 2,240 pounds from the Junction (known on the Pennsylvania as Mill Hall Junction) to Lock Haven, thereby constituting a through rate of $1.10 per 2,240 pounds.

These rates were initiated by the Director General and being those in effect on February 29, 1920, became, with the termination of Federal control, the established rates on March 1, 1920, by virtue of the "Transportation Act, 1920," entitled "An Act to provide for the termination of Federal control of railroads and systems of transportation, etc.," particularly Section 208 (a).

The complaint was filed prior to March 1, 1920, and avers that the said rates established by the Director General will be unjust, unreasonable, excessive and discriminatory after the return of the said railroads, and will be in violation of The Public Service Com-
[fol. 13] pany Law: that since three years have not elapsed since December 10, 1917, when the rates on said movement were fixed

by this Commission, and thirty days' notice previous to application to the Commission and service of notice of such application not having been made is a violation of said order of the Commission of December 10, 1917, and of Paragraph (f), Section 1, Article II, of The Public Service Company Law; that complainants will be greatly damaged by the charging of the said rates; that the respondents be ordered to put into effect rates which will not exceed the rates established in said order of December 10, 1917; and that reparation be awarded to complainant in respect of all rates and charges which it may be compelled to pay after March 1, 1920, in excess of the rates established by said order of December 10, 1917.

Under date of July 24, 1917, the Commission determined and ordered established the proportional rate of 45 cents per 2,240 pounds to apply from the Munson and Hawk Run Districts to Bald Eagle Junction on the New York Central Railroad. The rate of the Pennsylvania Railroad from the junction to Lock Haven was at that time 20 cents per 2,240 pounds. The effect was to establish the through rate of 65 cents.

During the same year, pursuant to a general increase in coal rates, the carriers sought to increase each of these rates by fifteen cents which would have had the effect of increasing the through rate thirty cents per ton. Complainants, amongst others, attacked the proposed increase and later, on December 10, 1917, an order was made which established the rate from the Munson and Hawk Run Districts to Bald Eagle Junction (Proportional) on the New York Central Railroad as 55 cents per 2,240 pounds and the Pennsylvania Railroad rate, Mill Hall Junction (Bald Eagle Junction) to Lock Haven, 25 cents per 2,240 pounds, the sum being the through rate [fol. 14] 80 cents per 2,240 pounds. These rates were published by the carriers effective December 24, 1917.

The complainant contends that the Transportation Act of 1920, Section 208 (a), does not establish the legal intrastate rates on March 1, 1920; that Congress has no authority to regulate Intrastate Commerce and therefore cannot fix these rates as the legal rates. Even if the said act is intended to apply to intrastate rates and to continue in effect for such traffic rates established by the Director General, upon relinquishment from Federal control the State law becomes immediately operative. The rates herein issued having been determined by the Commission within three years of March 1, 1920, those rates as increased during Federal control can be made legal only after an application to the Commission, upon thirty days' notice, as prescribed in The Public Service Company Law, Article II, Section 1 (f).

The respondents argue that in view of the decision in Northern Pacific Railway Co. vs. North Dakota, 250 U. S., 135, there is no question that during the period of Federal control the rates in issue were the lawful rates; and since they were the lawful rates on February 29, 1920, they continue to be the lawful rates by virtue of Section 208 (a) of The Transportation Act, and that the provisions of the Pennsylvania Public Service Company Law do not render them illegal.

The Transportation Act of 1920, Section 208 (a), establishes the intrastate rates as well as the interstate rates to be effective upon the termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates "shall continue in force and effect until thereafter changed by State * * * authority." Congress enacted the [fol. 15] laws which made possible the assumption of control and the operation of the railroads of the country and logically must provide the legislation for the return of those properties to their owners.

Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners.

The provision of the law here invoked is that portion of sub-section (f) of Section 1 of Article II:

" * * * That no rate, practice, or classification which shall have been determined by the Commission shall be changed or discontinued by the Public Service Company, directly or through any change in classification, rules, regulations, contracts, or practices, within a period of three years after such determination, without application to and the approval of the commission, of which application thirty days' prior notice shall be given in the said tariffs, or schedules to the public: * * * "

We cannot agree with the contention of the complainant that, because of the failure of the respondent to make the application and to give thirty days' prior notice thereof as required by this provision of the act, the rates determined within the three-year period and in effect prior to Federal control must be re-established. There were extraordinary circumstances obtaining preliminary to the termination of Federal control—the time when the application should have been prepared. It will be recalled that the date for the restoration [fol. 16] of the carriers to their owners was enveloped in much uncertainty and was at least once postponed. When a definite course was finally decided upon which took form in the Transportation Act, that act became a law, but two days before the date fixed for the return of the carriers, namely, February 28, 1920. The act provides that "Federal control shall terminate at 12:01 A. M. March 1, 1920; * * * " Upon the same day the rates became effective. Prior thereto the respondents' officials were answerable to the Director General for all actions. It was, therefore physically impossible to the respondents to file the application and give thirty days' notice thereof prior to the effective date. In justice to the respondents and under a reasonable appreciation of the peculiar state of affairs attending the return of the railroads to their owners, we are not inclined and do not consider ourselves justified to declare the rates under attack illegal upon this technicality. In all other respects, and to the fullest extent possible, the provision of the law

must be enforced. It is proper that the Commission shall review these rates which are changes made within the three-year limit of repose allowed rates determined by it, giving due consideration to the events which intervened.

The rules as to the burden of proof should be the same, it is contended by complainant, as if Federal control had not taken place, and, therefore, the respondents must justify the increases over the rates determined by the Commission.

Respondents' position is that since this rate is now lawfully in effect and is not a rate which is proposed to be put into effect, it follows that under Article V, Section 4, of The Public Service Company Law the burden is upon the complainants to show that the rate is unreasonable.

[fol. 17] It is our opinion that respondents' position as to the burden of proof is untenable. The facts are that the rates complained of became State rates and amenable to the Public Service Company Law only upon filing with this Commission effective March 1, 1920. Prior thereto and during the period of Federal control they were Federal rates and not State rates. The complaint having been filed prior to the date when they became State rates and subject to our jurisdiction the burden of proof is upon the respondents.

The complainant contends that these rates, established by authority of General Order No. 28 of the Director General, are unreasonable because they were established as part of a scheme to raise revenue to meet the cost of operating the railroads of the United States as a unit regardless of the cost of any particular movement or the value of the particular service rendered, or the relation to similar commodities transported under substantially the same conditions. Further, a rate constructed as part of a general plan to increase operating revenues while the roads were being operated as a unit, may, and probably will not be reasonable after the return of the railroads to their respective owners. Bell Telephone Company's application, 6 Penna. Corp. Reporter, p. 466. The evidence in the case before the Interstate Commerce Commission, 58 I. C. C. 124-129, which it was agreed by counsel shall be considered in evidence in this case, shows that the defendants practically abandoned their contention that the rate of $1.10 was properly constructed under General Order No. 28 and introduced evidence to establish that said increase was reasonable per se.

The complainants further contend that the testimony "is of no value because it does not show any change in the circumstances which were before this Commission in C. D. No. 1089, except there is [fol. 18] a general statement that operating costs have increased"; the exhibits introduced by the defendants in that case are of no probative value because the rates shown are the result of the same order and are arbitrary; the extent of movements is not shown except that they were substantial.

Should the rate structure established by General Order No. 28 be recognized, complainant argues that the rate should be but $1 by the correct application of that order to the rate in effect on May 25, 1918, as determined by this Commission. The contention of respondents

that the rate determined by The Public Service Commission was the subject of litigation between the parties and the rate used had not been declared illegal because the Supreme Court of Pennsylvania had not (at that time) decided the question, is answered by the statement that the order of the Commission and the judgment of the Court establish the legality of the rate, the case having been decided April 12, 1920, New York and Pennsylvania Co. v. New York Central Railroad Co., 267 Pa., 64.

Respondents stress complainant's testimony that if General Order No. 28 is properly applied complainant is satisfied. The exhibits, respondents contend, establish the reasonableness of the rate by comparison with other rates within the same general territory for corresponding distances, which show that the rate complained of is no higher than any rate for an equal distance and is lower than most of the rates in this region. The rate is consistent with the general scheme of rates applying in this region, and in fact is lower than most of the rates in the region. The operating difficulties on this portion of the road are also dwelt upon.

The record and the Commission's tariff file clearly establish the fact that the only changes made in the rates here in issue during Federal control from those in effect just prior to Federal control [fol. 19] were in pursuance of General Order No. 28 of the Director General. The legality and necessity of that order were at least tacitly acknowledged by this Commission in that by Special Permission No. 2367 of August 10, 1920, the increases allowed by Ex Parte 74, 58 I. C. C., 220-260, which were superimposed upon those made under General Order No. 28 were permitted. Public Service Commission et al. v. Erie Railroad Company, C. D. Nos. 3724 and 3739. It is also established of record that in applying the formula prescribed by that order the rate which this Commission had determined and which was in effect was ignored and instead the rate theretofore in effect and which had been cancelled was used as the base.

The increase of 15 cents per ton therein referred to was authorized by our order, hereinbefore referred to, which shows that the respondents reached a solution satisfactory to them that the increase should be added to the through rate and should accrue 10 cents per ton to the New York Central Railroad and five cents per ton to the Pennsylvania Railroad. The respondents' officials, then under the direction of the Director General, were, therefore, fully aware that the increase of 15 cents per ton had been made and were not justified in disregarding the rates established by our order.

The expensive operating conditions and the comparisons of rates in the same general territory were before us in the original case and the increased costs which have since prevailed are presumed to be met by the general increases designed for that especial purpose.

Upon all of the facts of record we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August [fol. 20] 25, 1920, both inclusive, should be $1 per 2,240 pounds,

and effective August 26, 1920, the date of the 40 per cent increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2,240 pounds. Respondents will be directed by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40 proportioned between them as they shall agree, failing which the Commission will determine the division.

Upon the presentation of a petition accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

8/17/21.

[fol. 21] EXHIBIT "B" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY

Order

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now to-wit, August 16, 1921, It Is Ordered: That the New York Central Railroad Company and the Pennsylvania Railroad Company, respondents, within fifteen (15) days from the date of the service of this order, severally file, post and publish, effective upon one day's notice to the public and this Commission, tariff schedules which will provide a through rate on bituminous coal in carloads from the Munson District and Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, of $1.40 per 2,240 pounds.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest, Jno. G. Hopwood, Secretary. (Seal.)

[fol. 22] EXHIBIT "C" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY

Order

It appearing to The Public Service Commission of the Commonwealth of Pennsylvania that a variance exists between the Commission's report of August 16, 1921, in the above entitled complaint, and its order based thereon, with respect to the time within which the New York Central Railroad Company, and the Pennsylvania Railroad Company should file the respective tariff schedules therein ordered to be filed by said respondents:

Now, to-wit, August 29, 1921, It is Ordered: That the order of the Commission of August 16, 1921, in the above-entitled complaint, be and the same is hereby amended so that the tariff schedules therein ordered to be filed by the New York Central Railroad Company and the Pennsylvania Railroad Company, respondents, pursuant to said report and order, shall be severally filed within thirty days from the date of the service of the report and original order.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

[fol. 23] EXHIBIT "D" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY

Order

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition of the New York

Central Railroad Company, and the Pennsylvania Railroad Company, for rehearing, and the matters and things involved having been fully considered:

Now, to-wit, September 6, 1921, It Is Ordered: That the petition for rehearing filed in this case be and the same is hereby refused, and the report and order of the Commission of August 16, 1921, as amended by the order of August 29, 1921, be and the same is hereby affirmed.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

[fol. 24] EXHIBIT "E" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY

Supplemental Report and Order

By the COMMISSION:

The Commission has heretofore found and determined that the just and reasonable through rate for the transportation of bituminous coal, in carloads, from the Munson District and the Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, is $1.40 per gross ton. By orders dated August 16, 1921, and August 29, 1921, the Commission directed the respondents to severally file, post and publish, effective upon one day's notice to the public and the Commission, tariff schedules which will provide a through rate on bituminous coal, in carloads, from the Munson District and Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, of $1.40 per 2,240 pounds. The report, which is a part of said orders, directed that the respondents shall proportion the rate between them as they shall agree, failing with the Commission will determine the division.

It appearing that the respondents have been unable to agree as to the proportions of the through rate which shall be published by them [fol. 25] severally, and an informal conference between them and representatives of the Commission having failed to bring about an

agreement, and the New York Central Railroad Company having tendered for filing, in pursuance of said orders, Supplement No. 3 to P. S. C.—Pa. N. Y. C. No. C-63, Joint Local and Proportional Coal Tariff No. 592, which purports to make effective a rate of 97 cents per 2,240 pounds from mines in the Munson and Hawk Run Districts to Bald Eagle Junction (proportional), which with the Pennsylvania Railroad Company's rate of 56 cents per 2,240 pounds from said junction to Lock Haven, results in a through rate of $1.53 per gross ton, the respondents, because of their inability to agree upon the apportionment of the through rate, have failed of compliance with said orders of the Commission; and, therefore,

Now, to-wit, October 18, 1921, It is ordered: That the New York Central Railroad Company and the Pennsylvania Railroad Company, respondents, within ten days from the date of the service of this order, file, post and publish, effective upon one day's notice to the public and this Commission, a joint tariff which will provide a joint through rate on bituminous coal, in carloads, from the Munson District and the Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, via Bald Eagle Junction (Mill Hall Junction), of $1.40 per 2,240 pounds.

The Commission will upon petition of either party determine the just and reasonable division of the joint rate.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: Jno. G. Hopwood, Secretary. (Seal.)

[fol. 26] Exhibit "F" to Statement of Claim

The Public Service Commission of the Commonwealth of Pennsylvania

Complaint Docket, No. 4738

New York and Pennsylvania Company

vs.

The New York Central Railroad Company, The Pennsylvania Railroad Company

Report of the Commission

By the Commission:

In New York and Pennsylvania Company vs. The New York Central Railroad Company et al, C. D. 3206 (P. U. R. 1921 E p. 80), the Commission determined that the just and reasonable through rate for the transportation of bituminous coal from the Muncy District and the Hawk Run District on the New York Cen-

tral Railroad to Lock Haven, Pa., was $1.00 per 2,240 pounds for the period March 1 to August 25, 1920, and effective August 26, 1920, and thereafter $1 40 per 2,240 pounds. By subsequent order, because the respondents could not agree as to the proportions of the through rate, the Commission directed the publication of the through rate of $1.40 as a joint rate. The Commission's order was duly complied with. There was no appeal taken from either of these orders.

On February 6, 1922, the complainant filed the petition now before us for reparation for the charges paid in excess of the rates determined by the Commission. The parties are agreed as to the amount of the charges paid in excess of the rates found and determined by the Commission, i. e. $5,484.41 for the period March 1 to August 31, 1920, and $16,708.40 for the period subsequent to [fol. 27] August 31, 1920. As to the latter period the respondents' position is definitely stated in brief of argument submitted:

"The defendants do not at this time contest the conclusion of this Commission as to the re-sonableness of the rates applicable to complainant's shipments moving subsequent to September 1, 1920, and and they do not contest the power of this Commission to award reparation on such shipments."

As to the period covered by Federal Guaranty its position is equally definite:

"They do, however, contest both the validity of the Commission's decision in case No. 3206 and its power to award reparation in the present case with respect to shipments moving between March 1, 1920, and August 31, 1920, and these are the issues to be considered in this brief." * * *

"It is the defendants' position, first, that since the rates attacked were in effect on Feb. 29, 1920, they continued to be lawful rates for this transportation and that the decision of this Commission in Case No. 3206, insofar as it purported to effect a reduction in the rates of the defendants for transportation between March 1, 1920, and September 1, 1920, was void because not approved by the Interstate Commerce Commission and could, therefore, give the complainant no right to reparation; and, Second, that an order in this case requiring the defendants to pay reparation on such shipments would, in effect, be an order reducing the rates charged and, without the approval of the Interstate Commerce Commission, would be of no effect under the section of the Transportation Act above quoted."

[fol. 28] The first of these objections that the rates in effect on March 1, 1920, and during the six months following were lawful rates was advanced by respondent in the original proceeding (P. U. R. 1921E, p. 80 supra) wherein we determined the reasonable rates. There is no question but that the rates were the lawful rates in the sense that they were "a collectible rate, or one that may be sued for." Suburban Water Company vs. Borough of Oakmont

268 Pa. 243. The position that the rates in effect on March 1, 1920, were not reviewable by this Commission on complaint is without support in law. In our former opinion we stated:

"The Transportation Act of 1920, Section 208 (a), established the intrastate rates as well as the interstate rates to be effective upon the termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates 'shall continue in force and effect until thereafter changed by State * * * authority.' Congress enacted the laws which made possible the assumption of control and the operation of the railroads of the country, and logically, must provide the legislation for the return of those properties to their owners.

"Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners."—P. U. R. 1921E, p. 83, Supra.

[fol. 29] and we see no reason for any change, particularly as the parties have not by appellate proceedings sought modifications or reversal of our conclusions.

The Interstate Commerce Commission considered itself without jurisdiction to determine the reasonableness of intrastate rates in effect after March 1, 1920:

"We are asked to prescribe reasonable and non-prejudicial rates for the future and to grant reparation on shipments moving since August 8, 1918. Except under certain circumstances not here present our jurisdiction over intrastate rates terminated with the relinquishment of the carriers from Federal control. Only the rates in effect during the period of Federal control will be considered." Western Lime & Cement Co. vs. Director General, as Agent, et al. 58 I. C. C. 509.

"Reparations and just and reasonable rates for the future are sought. Our jurisdiction over the intrastate rates assailed, except under circumstances not here presented, is limited to cases falling within the provision of Section 206 (e) of the Transportation Act, 1920. Rates will be stated in cents per 100 pounds." Barnett Oil & Gas. Co. vs. Director General, as Agent, et al. 61 I. C. C. 569.

"The prayer is for just and reasonable rates for the future and for reparation on all shipments made after the filing of the Complaint. Our jurisdiction over intrastate rates, except under circumstances not here present, is limited to cases falling within the provisions of Section 206 (e) of the Transportation Act, 1920." Prince-Johnson Limestone Co. vs. Director General, as Agent, et al. 61 I. C. C. 602.

As to the contention that the rate determined by this Commis-
[fol. 30] sion effect a reduction in a rate prior to September 1, 1920, and that the approval thereof by the Interstate Commerce Commission has not been had, it must be borne in mind that our report and order were issued on August 16, 1921, which made it impossible to secure prior approval and that the Interstate Commerce Commission (March 13, 1922) concluded that it is without jurisdiction to pass upon claims for reparation arising from intrastate movements during the guaranty period and promulgated the following Conference Ruling:

"Voted that Section 208 (a) of the Transportation Act 1920 does not authorize the Commission to award reparation, or consent to an award of reparation made by a state commission, on intrastate shipments which moved during the guaranty period, March 1 to September 1, 1920."

On and after March 1, 1920, all intrastate rates became subject to the jurisdiction of the States and the Interstate Commerce Commission refused to consider any and all cases concerning state rates after that date, except those involving discrimination against interstate commerce and reductions proposed to become effective prior to September 1, 1920.

It, of course, cannot be contended that the Interstate Commerce Commission in the first instance had jurisdiction to award reparation on intrastate traffic during the guaranty period. Under any interpretation of the Transportation Act the State Commissions must take the initiative. Unless it be concluded that the complainantt is wholly without means of redress, the State Commission must act; and now that the Interstate Commerce Commission disclaims authority in the premises, it becomes of more importance that this Commission shall fulfill the obligation imposed by its own organic act. A somewhat similar situation arose in the Public Service Com-
[fol. 31] mission of the Commonwealth of Pennsylvania et al., vs. Erie Railroad Company, C. D. Nos. 3724 and 3739 (9 P. C. R. 245) and in subsequent reparation proceedings (Mansfield Dairy Company vs. Erie Railroad Company C. D. No. 4189, Charles McDowell vs. Erie Railroad Company C. D. No. 4161, Decker & Cook vs. Erie Railroad Company C. D. No. 4162) where similar conclusions were reached.

In view of the possiblity of subsequent litigation and in justice to the complainant and the respondents, two orders for reparation will issue, one for the guaranty period and the other for the period following.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

[fol. 32] EXHIBIT "G" TO STATEMENT OF CLAIM

Complaint Docket, No. 4738

NEW YORK AND PENNSYLVANNIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPAN, THE PENNSYLVANIA RAILROAD COMPANY

Order No. 1

(For the Period March 1 to August 31, 1920)

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition for reparation and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having found and determined by its report and order dated August 16, 1921, in Complaint Docket No. 3206, the just and reasonable through rate for the transportation of bituminous coal, in carloads, from the mines in the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive, to be $1.00 per 2,240 pounds, and for the period August 26, 1920, to August 31, 1920, both inclusive, to be $1.40 per 2,240 pounds, the Commission now finds and determines that the rates of $1.10 and $1.54 per 2,240 pounds, respectively, charged the complainant for the transportation of bituminous coal between the points and during the periods above mentioned were unjust and unreasonable and contrary to law, by reason whereof the complainant is entitled to reparation in the sum of Five Thousand Four Hundred and Eighty-four and 41/100 ($5,484.41) Dollars, for damages sustained which is hereby accordingly awarded, with interest thereon from the date of the improper collection to July 1, 1922, which is found to be Six Hundred Eighty-eight and 56/100 ($688.56) Dollars.

Now, to-wit, June 20, 1922, it is ordered: That the said New York Central Railroad Company, and the Pennsylvania Railroad Company, respondents, be and are hereby directed to pay to the New York and Pennsylvania Company, complainant, within fifteen (15) days from the date of the service of this order, the sum of Six Thousand One Hundred Seventy-two and 97/100 ($6,172.97) Dollars, as reparation as above awarded.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

[fol. 33] EXHIBIT "H" TO STATEMENT OF CLAIM

Complaint Docket, No. 4738

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY

Order No. 2

(For the Period September 1, 1920, and Thereafter)

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition for reparation and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having found and determined by its report and order dated August 16, 1921, in Complaint Docket No. 3206, the just and reasonable through rate for the transportation of bituminous coal, in carloads, from the mines in the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad on and after September 1, 1920, to be $1.40 per 2,240 pounds, the Commission now finds and determines that the rate of $1.54 per 2,240 pounds, charged the complainant for the transportation of bituminous coal between the points above mentioned on and after September 1, 1920, was unjust and unreasonable and contrary to law, by reason whereof the complainant is entitled to reparation in the sum of Sixteen Thousand Seven Hundred Eight and 40/100 ($16,708.40) Dollars, for damages sustained which is hereby accordingly awarded, with interest thereon from the date of the improper collection to July 1, 1922, which is found to be One Thousand Two Hundred Sixty-nine 77/100 ($1,269.77) Dollars.

[fol. 34] Now, to-wit, June 20, 1922, it is ordered: That the said The New York Central Railroad Company, and The Pennsylvania Railroad Company, respondents, be and are hereby directed to pay to the New York and Pennsylvania Company, complainant, within fifteen (15) days from the date of the service of this order, the sum of Seventeen Thousand Nine Hundred Seventy-eight and 17/100 ($17,978.17) Dollars, as reparation as above awarded.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

To the within defendants:

You are required to file an Affidavit of Defense to this Statement of Claim within fifteen days from the service hereof.

T. R. White.

All papers to be served on B. F. Geary, Attorney for Plaintiff, No. 132 E. Water St., Lock Haven, Pa.

[File endorsement omitted.]

[fol. 35] In Common Pleas Court of Clinton County

Summons and Sheriff's Return

The Commonwealth of Pennsylvania to the Sheriff of Clinton County, Greeting:

We command you that you summon the New York Central Railroad Co., a corporation of the State of N. Y., and the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, so that they be and appear before our Court of Common Pleas, to be holden at Lock Haven, in and for said County, on the Fourth Monday of Nov. next, to answer New York and Pennsylvania Company a Corporation of the State of Pennsylvania, in an Action of Assumpsit, and have you there this writ.

Witness Hon. E. H. Baird, President Judge of our said Court, at Lock Haven, the 19th day of Oct. A. D., 1922.

Geo. G. Hickoff, Prothonotary. (Seal.)

Now, October 21, 1922, served the within Summons in Assumpsit together with Statement of Claim, upon the New York Central Railroad Company, a corporation, by handing true and correct copies of the within writ to I. H. Kennedy, its Agent, at its station, at Castanea, Clinton County, Pa. and making known to him the contents thereof. Upon inquiry thereat, the residence of the President, Secretary, Treasurer, Cashier, Chief Clerk — other Executive Officer was not found in the County of Clinton.

Same date, served same writ upon the Pennsylvania Railroad Company, a corporation, by handing true and correct copies of the within writ to D. R. Goodlander, its Agent, at its station, at Lock Haven, Clinton County, Pa., and making known to him the contents thereof.

Upon inquiry thereat, the residence of the President, Secretary, Treasurer, Cashier, Chief Clerk or other Executive Officer was not found in the County of Clinton.

So ans.—

F. M. Johnston, Sheriff.

Endorsement: No. 5, Jany. Term 1923.—Summons in Assumpsit. —New York and Pennsylvania Company vs. The New York Central Railroad Co. and the Pennsylvania Railroad Company.—Shff. fee $6.00.—B. F. Geary, Pl'ff's Att'y.

[fol. 36] In Court of Common Pleas of Clinton County

[Title omitted]

Appearance of Counsel—Filed Nov. 27, 1922

Enter our appearance for the Pennsylvania Railroad Company, above named defendant.

M. E. Haggerty, McCormick & Hipple, Attorneys for Pennsylvania Railroad Company.

[File endorsement omitted.]

[fol. 37] In Court of Common Pleas of Clinton County

[Title omitted]

Appearance of Counsel—Filed Nov. 27, 1922

Enter our appearance for the New York Central Railroad Company, above named defendant.

M. E. Haggerty, McCormick & Hipple, Attorneys for New York Central Railroad Company.

[File endorsement omitted.]

[fol. 38] In Court of Common Pleas of Clinton County

[Title omitted]

Affidavit of Defense of the New York Central Railroad Company, One of the Defendants Above Named, to the Plaintiff's Statement of Claim.—Filed Nov. 27, 1922

The New York Central Railroad Company, one of the defendants above named, answering the Plaintiff's Statement of Claim, or so much thereof as it is advised is material for it to answer, says that it has a just, full and true defense to the claims of the plaintiff in the above stated action, the nature and character of which are herein set forth in its affidavit of defense.

1. It is a consolidated corporation existing under and by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, having its principal office in the City of Albany and State of New York, and is and, at the times hereinafter described, was engaged as a common carrier in the transportation of freight and passengers between points in the State of Pennsylvania and in interstate commerce between points in the State of Pennsylvania and points in other States.

It admits the allegations contained in paragraph 1 of Plaintiff's Statement of Claim.

[fol. 39] 2. It admits that the freight rates charged and collected for the transportation of coal between the points named in paragraph 2 of the Plaintiff's Statement of Claim were on, and for a considerable period prior to February 29, 1920, as alleged in said paragraph 2; but avers that prior to February 29, 1920, the lines of the defendants were under Federal control and said rates were charged and collected by the President of the United States through the Director General.

3. As to paragraph 3 of the Plaintiff's Statement of Claim, it admits that prior to February 29, 1920, the lines of the New York Central Railroad Company were under Federal control, and that on March 1, 1920, pursuant to the terms of an Act of Congress known as the Transportation Act, 1920, 41 Stat., L., 456, Federal control was terminated in certain respects; but this defendant alleges that by the provisions of Section 208 (a) of the Transportation Act, 1920, the freight rates in effect on its lines on February 29, 1920, were continued in effect until thereafter changed by State or Federal authority, or pursuant to authority of law, but prior to September 1, 1920, no such rate was permitted to be reduced unless with the approval of the Interstate Commerce Commission.

4. It admits the allegation contained in paragraph 4 of the Plaintiff's Statement of Claim.

5. As to the allegations contained in paragraph 5 of Plaintiff's Statement of Claim, it admits that on August 26, 1920, by tariffs duly filed, the through rate for the transportation of coal from mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, was increased from $1.10 to $1.54, which rate was thereafter collected; but it avers that this increase in the through rate was not accomplished by the establishment of a joint rate of $1.54, as [fol. 40] alleged in paragraph 5 of the Plaintiff's Statement of Claim, but by increases in the separately published rates of The New York Central Railroad Company and The Pennsylvania Railroad Company—the rate of The New York Central Railroad Company from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction being increased to 98 cents, and the rate of The Pennsylvania Railroad Company from Bald Eagle Junction to Lock Haven, Pennsylvania, being increased to 56 cents per ton.

6. As to the allegations contained in paragraph 6 of the Plaintiff's Statement of Claim, it admits that proceedings were had, as alleged in said paragraph, and that the Public Service Commission of Pennsylvania made the reports and orders which are attached to the Plaintiff's Statement of Claim and marked "Exhibits 'A,' 'B,' 'C,' 'D' and 'E,'" but in none of these reports or orders is to be found any order with respect to the rates which were in effect, as alleged in the Plaintiff's Statement of Claim, during the period from March 1, 1920, to September 1, 1920. This defendant avers that, while the Public

Service Commission purported to find that the just and reasonable rate for the through movement of coal from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, for the period from March 1, 1920, to August 25, 1920, was $1.00 per ton, and from August 26, 1920, to September 1, 1920, was $1.40 per ton, nevertheless the Commission's finding as to a just and reasonable rate during the period from March 1, 1920, to September 1, 1920, was nugatory and of no avail, and the said finding is of no effect and in violation of Section 208 (a) of the Transportation Act, 1920. This defendant further avers that while the finding, as stated above, was made by the Public Service Commission in the reports referred to, it entered no order at that time with respect to the matter, and [fol. 41] thereafter issued no order save and excepting the order of reparation which is the subject of this suit, and which is shown in the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated "Exhibit G."

7. It denies the allegations contained in paragraph 7 of the Plaintiff's Statement of Claim, and on the contrary it avers that said rates were just and reasonable and were not in violation of the Public Service Company Law.

8. It admits that no appeal was taken by the defendant from the report and orders of the Public Service Commission, referred to in paragraph 8 of the Plaintiff's Statement of Claim, but it avers that in the said report and orders, no order was made with respect to the reasonableness of the rates in effect between March 1, 1920, and September 1, 1920, and no order of reparation in respect thereto. The only order made by the Commission with regard to the rates in effect during this period was the order of reparation hereinbefore referred to, which is included as part of the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated "Exhibit G."

9. As to the allegations contained in paragraph 9 of the Plaintiff's Statement of Claim, it admits that the plaintiff shipped over its lines from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, the amounts of coal therein alleged, and that plaintiff paid the freight charges which exceeded, by the amounts alleged, the freight charges which it would have paid under the rates which the Public Service Commission of Pennsylvania purported to order and find reasonable; but it denies that the rates actually paid by the plaintiff were in excess of reasonable rates.

[fol. 42] 10. It has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegation contained in paragraph 10 of the Plaintiff's Statement of Claim, and if said allegation is deemed material, this defendant prays that the plaintiff be required to make proper proof thereof.

11. As to the allegations contained in paragraph 11 of the plaintiff's Statement of Claim, it admits that proceedings were had, as alleged therein, and that the Public Service Commission of Penn-

sylvania made the report and order herein described; but it alleges that so much of the Commission's report as purported to hold that the rates charged by the defendants on shipments moving between March 1, 1920, and August 31, 1920, were unreasonable and Order No. 1 attached to Plaintiff's Statement of Claim as "Exhibit G" were in violation of Section 208 (a) of the Transportation Act, 1920, and therefore are of no effect.

12. It admits the allegations contained in paragraph 12 of the Plaintiff's Statement of Claim.

13. It admits the allegations contained in paragraph 13 of the Plaintiff's Statement of Claim.

14. For a separate and complete defense to the Plaintiff's Statement of Claim, it avers that its rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission Re-[fol. 43] ports, page 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which report is hereto attached, made part hereof and marked "Exhibit A," and to which proceeding reference is hereby specially made with the same effect as if full copies thereof had been attached hereto; it alleges that by Section 208 (a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including Section 208(a) thereof; it alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law.

15. It alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as "Exhibit G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was, therefore null and void.

16. It alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff has no cause of action under Section 5 of Article 5 of the Public Service Company Law.

[fol. 44] Wherefore, the defendant avers that it is not liable to the plaintiff in any amount on account of the matters and things set forth in Plaintiff's Statement of Claim. All of which defendant avers is true and correct and defendant expects to be able to prove the same by competent evidence at the trial of said cause.

The New York Central Railroad Co., by G. H. Ingals, Its Vice-President.

Jurat showing the foregoing was duly sworn to by Geo. H. Ingalls omitted in printing.

[fol. 45] No. 28868, Series B, Form 2

STATE OF NEW YORK,
County of New York, ss:

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said County, do hereby certify, that said Court is a Court of Record, having by law a seal; that C. A. Halpin, whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public, acting in and for said County, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Westchester with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, and that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York in the County of New York, this 22nd day of November 1922.

James A. Donegan, Clerk.

[fol. 46] EXHIBIT "A" TO AFFIDAVIT

187162—20.
Washington; Government Printing Office; 1920.

6263

INTERSTATE COMMERCE COMMISSION

No. 10729

NEW YORK & PENNSYLVANIA COMPANY

v.

DIRECTOR GENERAL, as Agent New York Central Railroad Company, et al.

No. 10729

NEW YORK & PENNSYLVANIA COMPANY

v.

DIRECTOR GENERAL, as Agent New York Central Railroad Company, et al.

Submitted April 10, 1920. Decided June 18, 1920.

Rates of $1.10 per gross ton for the transportation intrastate of bituminous coal, carloads, from the Snow Shoe, Grass Flat, Munson, and Hawk Run Districts of Central Pennsylvania applicable via the lines of the New York Central and Pennsylvania Railroads to Lock Haven Pa., not found to have been unreasonable or otherwise unlawful. Complaint dismissed.

E. Bartram Richards and Thomas Raeburn White for Complainant.

Parker McCollester and John M. Sternhagen for defendants.

[fol. 47] Report of the Commission

Division I, Commissioners McChord, Meyer, and Eastman

MEYER, Commissioner:

This case was made the subject of a proposed report. Exceptions thereto were filed by the complainant and oral argument had.

Complainant is a corporation engaged in the manufacture of pulp and paper with mills at Lock Haven and Johnsonburg, Pa., and Willsboro, N. Y. At the Lock Haven mill it consumes yearly approximately 120,000 gross tons of bituminous coal. Alleging violation of Section 1 of the Act to regulate commerce and Section 10

of the Federal control Act, unjust discrimination, and undue prejudice in contravention of the first-named Act, the complaint, filed June 26, 1919, assails the current proportional rate of 70 cents per gross ton of the New York Central Railroad Company applied to the transportation of bituminous coal, in carloads, from mines located on the lines of that company in Snow Shoe, Grass Flat, Munson, and Hawk Run Districts of the Clearfield region of Central Pennsylvania to Bald Eagle Junction, Pa., also the combined through rates from those districts to Lock Haven, of $1.10 per gross ton, composed of that proportional rate and the local rate of the Pennsylvania Railroad Company of 40 cents per gross ton thence to Lock Haven, to the extent that such through rates exceed $1 per gross ton. Complainant seeks the restoration of the rate of $1, in effect immediately prior to July 11, 1919, and reparation upon all shipments moving since. While, as just stated, the proportional rates of the New York Central are attacked complainant's sole concern is that the through rates shall not exceed the amount stated and it is immaterial to it what rates aggregating that amount are received [fol. 48] by each of the carriers. As rates for the future are no longer subject to our jurisdiction, reparation alone is involved.

The traffic is originated by the New York Central, which transports it from 31 to 55 miles, dependent upon the location of the mine, to what is called in its tariffs Bald Eagle Junction; in the tariffs of the Pennsylvania, Mill Hall. The distance from this junction of the two carriers to Lock Haven is 4.2 miles, but the paper mill of the complainant is distant but 3 miles from the junction.

All the coal here considered originated in the Munson and Hawk Run Districts, the rates are grouped, and have been the same since June 25, 1918. For the purpose of this report, therefore, the rates from those two districts disclose the rate situations. Rates herein are stated in amounts per ton of 2,240 pounds.

On July 11, 1919, the proportional rate of the New York Central was increased from 60 to 70 cents; the local rate of the Pennsylvania was unchanged; hence the through rate was correspondingly increased. The rate of 60 cents, effective June 25, 1918, defendants assert was, through clerical error, 10 cents too low. Complainant contends that the rate of 70 cents, effective July 11, 1919, was the result of an erroneous application of General Order No. 28 of the Director General of Railroads and the increase was superimposed upon an illegal rate. Complainant's case rests on this contention. No testimony directed to any other issue was submitted by complainant, it being urged that incorrect application of the general order in respect of the rates here considered and correct application of the order to other rates constitutes violation of the provisions of the acts invoked.

[fol. 49] The following tabular statement in chronological order shows the rates from September 19, 1916, to date:

Date	Munson and Hawk Run to Bald Eagle Junction	Bald Eagle Junction to Lock Haven	Through rates
	Cents	Cents	Cents
Sept. 19, 1916	45	20	65
Sept. 20, 1916	55	20	75
July 1, 1917	65	35	100
Aug. 24, 1917	45	35	80
Dec. 24 1917	55	25	80
June 25, 1918	60	40	100
July 11, 1919	70	40	110

The pertinent portions of General Order No. 28, issued May 25, 1918, as supplemented June 12, 1918, are:

* * * all existing freight rates * * * be increased or modified, effective June 25, 1918, * * * to the extent and in the manner indicated and set forth in the "Exhibit" hereto attached * * *

* * * * * * *

Coals:

* * * * * * *

Where rate is 50 to 99 cents per net ton—20 cents.

* * * * * * *

Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated, and to the rates so constructed the above increases shall now be added.

[fol. 50] The order provided that in applying rates per ton fractions should be disposed of by omitting amounts of less than 5 cents; amounts of 5 cents or greater but less than 10 cents to be increased to 10 cents.

Prior to May 21, 1916, the rate from the Munson and Hawk Run Districts to Lock Haven was 95 cents for Pennsylvania delivery, made up of the 45-cent proportional rate to Bald Eagle Junction and 50 cents beyond. During this period the rate from these mines was 93 cents for New York Central delivery known as Lock Haven but outside the city limits and 2 miles from complainant's plant. On the above date, the rate of the Pennsylvania Railroad was reduced to 20 cents, resulting in a through rate of 65 cents, which was lower than the rates to intermediate points and lower than the rate for New York Central delivery. On September 20, 1916, the rate to Bald Eagle Junction was made by the New York Central 55 cents and the through rate became 75 cents. At the same time

the rate for New York Central delivery was reduced to 75 cents. On June 15, 1917, the rate to Bald Eagle Junction was made 65 cents and the rate beyond of the Pennsylvania Railroad 35 cents, the through rate being $1. At the time of the increase in the rate to Bald Eagle Junction to 55 cents, a complaint was filed by this complainant with the Public Service Commission of Pennsylvania, attacking the rate of the New York Central; and on July 24, 1917, that commission issued its report and order holding that it had jurisdiction over the through rate although the Pennsylvania Railroad was not a party defendant, but requiring the New York Central to restore the rate of 45 cents for the reason that it had not sustained the burden of proof placed upon it by law. The 45-cent rate was restored August 24, 1917. Shortly thereafter the New York Central applied to the Public Service Commission for authority to [fol. 51] increase its proportional rate by 15 cents to align the state rates with interstate rates permitted to be increased in The Fifteen Per Cent. Case, 45, I. C. C., 303. Complainant and other consumers of coal at Lock Haven protested against the granting of the permission for the reason that the through rate had already been increased 15 cents by the increase in the local rate of the Pennsylvania Railroad. The parties agreed with the approval of the commission to increase the proportional rate of the New York Central from 45 to 55 cents, and to reduce the local rate of the Pennsylvania Railroad from 35 to 25 cents. In other words the through rate was maintained without change, the increase of 15 cents being apportioned between the two carriers. Subsequently complainant filed a supplemental complaint with the Public Service Commission asking an award of reparation against the New York Central on shipments which had moved at the rate which the commission had found not justified. Reparation was awarded and the award has been sustained by the courts of Pennsylvania.

On June 25, 1918, an increase of 22.4 cents was added to the 80-cent through rate, under General Order No. 28, and the fraction dropped, making the through rate $1, the rate to Bald Eagle Junction being 60 cents and the rate beyond 40 cents. On July 1, 1919, the alleged error in making the increase of June 25, 1918, was corrected by adding to the through rate of 75 cents, in effect on June 1, 1917, 15 cents, and then adding 22.4 cents, as permitted by General Order No. 28, and dropping the fraction, making the through rate $1.10.

Complainant urges that the first step in applying the general order is to find the existing freight rate in effect May 25, 1918, at the time the general order was issued. The through rate on that date was 80 cents. The second step, in the view of the complainant, [fol. 52] is to determine whether or not the rate in effect on that date had been increased since June 1, 1917. The through rate was increased on July 1, 1917, when the Pennsylvania increased its local rate to 35 cents, and that increase was continued in the through rate on December 24, 1917, although apportioned between the two carriers. Therefore, in the view of the complainant there was no warrant in the general order to increase the rate existing on May

25, 1918, by 15 cents. In other words, it is the complainant's contention that the only use to which the rate in effect on June 1, 1917, could be put in the application of the general order was to determine whether the rate on May 25, 1918, embraced any or all of the increase of 15 cents.

It is also the contention of the complainant that the — reparation order operated to put the complainant in the position of never having paid the tariff rate of June 1, 1917, but only the rate which should have been in effect at that time. By that order the Commission held, in effect, that the tariff rate of June 1, 1917, could not, under any circumstances, be sustained, and that the complainants should be in the position in which they would have been if they had never been required to pay that rate.

Defendants contend that the order of the Public Service Commission requiring the New York Central to restore its proportional rate in effect September 19, 1916, can not be res adjudicata and conclusive upon this Commission in connection with an attack upon the through rate from the mines to Lock Haven; that the increases authorized under General Order No. 28 were to be computed with reference to rates in effect June 1, 1917, and that the through rate in effect on that date had not been increased 15 cents.

Defendants also take the position that irrespective of General [fol. 53] Order No. 28 the proper issue before us is whether or not the present rate of $1.10 is, as alleged, in violation of the acts invoked.

The only issue which is properly before us is the justness and reasonableness of the rate which is assailed, and the manner in which the rate was arrived at is only one of the elements to be considered in determining the issue.

The undue prejudice alleged is predicated on the contention that a greater increase was made in the rates in issue than in other rates increased under the general order.

Comparison is made by defendants of the rate of $1.10 from the Munson and Hawk Run Districts to Lock Haven over a two-line haul, for an average distance of 56 to 60 miles, with rates to Lock Haven from mines on the Pennsylvania Railroad of $1.10 from mines on the Snow Shoe branch, distances of 43 to 45 miles, and $1.50 from Osceola Mills, a distance of 74 miles. It is further shown that the rate to Lock Haven reasonably compares with rates from mines on the New York Central and the Pennsylvania Railroad to other points in the same territory for approximately equal distances.

On behalf of defendants, it is also urged that adverse operating conditions are encountered on the line over which the rate assailed applies, and that the grades on this line are so severe that it is not used for through traffic and that the traffic handled is comparatively small in amount.

It is contended by complainant that the comparisons of defendant have no weight for the reason that the reasonableness of the rate to Lock Haven in effect prior to the general order has been determined by the Public Service Commission of Pennsylvania.

The rate which was ordered reduced by that commission was the

proportional rate of the New York Central to Bald Eagle Junction, [fol. 54] and its finding was that the defendant had not sustained the burden of proof by showing that the rate was reasonable.

We have before us the through rate of the two carriers, and a determination that the reasonableness of one factor of such through rate has not been justified is not conclusive of the reasonableness of the through rate.

Upon consideration of the whole record, we are of opinion and find that the rates attacked were not unreasonable or otherwise unlawful as alleged.

An order dismissing the complaint will be entered.

Order

At a Session of the Interstate Commerce Commission, Division 1, Held at Its Office, in Washington, D. C., on the 18th Day of June, A. D. 1920.

No. 10729

New York & Pennsylvania Company

v.

Director General of Railroads, as Agent New York Central Railroad Company, et al.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, Division 1.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 55] In Court of Common Pleas of Clinton County

[Title omitted]

Affidavit of Defense of the Pennsylvania Railroad Company, One of the Defendants Above Named, To the Plaintiff's Statement of Claim—Filed Nov. 27, 1922

Walter Thayer, General Coal Freight Agent of The Pennsylvania Railroad Company, defendant in the above entitled cause, being duly

sworn, deposes and says that said defendant has a just, full, and true defense to the whole of the plaintiff's claim of the following nature and character, all of which defendant expects to prove at the trial of this case:

1. This defendant is a corporation existing under and by virtue of the laws of the State of Pennsylvania, having its principal office in the City of Philadelphia and State of Pennsylvania, and is and, at the times hereinafter described, was engaged as a common carrier in the transportation of freight and passengers between points in the State of Pennsylvania and in interstate commerce between points in the State of Pennsylvania and points in other States. It admits the allegations contained in paragraph 1 of Plaintiff's Statement of Claim.

2. This defendant admits that the freight rates charged and col- [fol. 56] lected for the transportation of coal between the points named in paragraph 2 of the Plaintiff's Statement of Claim were on, and for a considerable period prior to, February 29, 1920, as alleged in said paragraph 2; but avers that prior to February 29, 1920, the lines of the defendants were under Federal control and said rates were charged and collected by the President of the United States through the Director General.

3. This defendant admits that prior to February 29, 1920, the lines of The Pennsylvania Railroad Company were under Federal control, and that on March 1, 1920, pursuant to the terms of an Act of Congress known as the Transportation Act, 1920, 41 Stat., L., 456, Federal control was terminated in certain respects; but this defendant alleges that by the provisions of Section 208(a) of the Transportation Act, 1920, the freight rates in effect on its lines on February 29, 1920, were continued in effect until thereafter changed by State or Federal authority, or pursuant to authority of law, but prior to September 1, 1920, no such rate was permitted to be reduced unless by and with the approval of the Interstate Commerce Commission.

4. This defendant admits the allegation contained in paragraph 4 of the Plaintiff's Statement of Claim.

5. This defendant admits that on August 26, 1920, by tariffs duly filed, the through rate for the transportation of coal from mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, was increased from $1.10 to $1.54 which rate was thereafter collected; but it avers that this increase in the through rate was not accomplished by the establishment of a joint rate of $1.54, as alleged in paragraph 5 of the Plaintiff's Statement of Claim, but by increases in the separately published rates of The New York Central Railroad Company and the Pennsylvania Railroad Company—the rate of The New York Central Railroad Company from the mines in the Munson [fol. 57] and Hawk Run Districts to Bald Eagle Junction being increased to 98 cents, and the rate of The Pennsylvania Railroad Com-

pany from Bald Eagle Junction to Lock Haven, Pennsylvania, being increased to 56 cents per ton.

6. This defendant admits that proceedings were had, as alleged in said paragraph, and that the Public Service Commission of Pennsylvania made the reports and orders which are attached to the Plaintiff's Statement of Claim and marked Exhibits "A", "B", "C", "D" and "E", but in none of these reports or orders is to be found any order with respect to the rates which were in effect, as alleged in the Plaintiff's Statement of Claim, during the period from March 1, 1920, to September 1, 1920. This defendant avers that, while the Public Service Commission purported to find that the just and reasonable rate for the through movement of coal from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, for the period from March 1, 1920, to August 25, 1920, was $1.00 per ton and from August 26, 1920, to September 1, 1920, was $1.40 per ton, nevertheless, the Commission's finding as to a just and reasonable rate during the period from March 1, 1920, to September 1, 1920, was nugatory and of no avail, and the said finding is of no effect and in violation of Section 208(a) of the Transportation Act, 1920. This defendant further avers that while the finding, as stated above, was made by the Public Service Commission in the reports referred to, it entered no order at that time with respect to the matter, and thereafter issued no order save and excepting the order of reparation which is the subject of this suit, and which is shown in the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated Exhibit "G".

7. This defendant denies the allegations contained in paragraph 7 of the Plaintiff's Statement of Claim, and on the contrary avers that [fol. 58] said rates were just and reasonable and not in violation of the Public Service Law.

8. This defendant admits that no appeal was taken by the defendant from the report and orders of the Public Service Commission, referred to in paragraph 8 of the Plaintiff's Statement of Claim, but it avers that in the said report and orders, no order was made with respect to the reasonableness of the rates in effect between March 1, 1920, and September 1, 1920, and no order of reparation in respect thereto. The only order made by the Commission with regard to the rates in effect during this period was the order of reparation hereinbefore referred to, which is included as part of the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated Exhibit "G."

9. This defendant admits that the plaintiff shipped over its lines from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, the amounts of coal therein alleged, and that plaintiff paid the freight charges which exceeded, by the amounts alleged, the freight charges which it would have paid under the rates which the Public Service Commission of Pennsylvania purported to order and find reasonable; but it denies that the rates actually paid by the plaintiff were in excess of reasonable rates.

10. This defendant has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegation contained in paragraph 10 of the Plaintiff's Statement of Claim, and if said allegation is deemed material, this defendant prays that the plaintiff [fol. 59] be required to make proper proof thereof.

11. This defendant admits that proceedings were had, as alleged therein, and that the Public Service Commission of Pennsylvania made the report and order herein described, but it alleges that so much of the Commission's report as purported to hold that the rate charged by the defendants on shipments moving between March 1, 1920, and August 31, 1920, were unreasonable and Order No. 1 attached to Plaintiff's Statement of Claim as Exhibit "G" were in violation of Section 208(a) of the Transportation Act, 1920, and therefore are of no effect.

12. This defendant admits the allegations contained in paragraph 12 of the Plaintiff's Statement of Claim.

13. This defendant admits the allegations contained in paragraph 13 of the Plaintiff's Statement of Claim.

14. For a separate and complete defense to the Plaintiff's Statement of Claim, this defendant avers that the New York Central Railroad Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit "A." This defendant alleges that by Section 208(a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to [fol. 60] be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including section 208(a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law.

15. This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as Exhibit "G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was, therefore, null and void.

16. This defendant alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, was null and void, the plaintiff has no cause of action under Section 5 of Article 5 of the Public Service Company Law.

Wherefore, the defendant, The Pennsylvania Railroad Company, prays that the plaintiff's case may be dismissed and that it may be allowed its reasonable costs in this behalf.

McCormick & Hipple, Attorneys for the Pennsylvania Railroad Company. Henry Wolf Bikle, of Counsel.

[fol. 61] Jurat showing the foregoing was duly sworn to by Walter Thayer omitted in printing.

[fols. 62–69] Exhibit "A" to Affidavit—Omitted; printed side page 46 ante

[fol. 70] [File endorsement omitted.]

[fol. 71] Order to Show Cause—Omitted; printed side page 2 ante

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[fol. 72] In Court of Common Pleas of Clinton County

[Title omitted]

Reasons in Support of Motion for Judgment Against the Pennsylvania Railroad Company, One of the Above-named Defendants, for Want of a Sufficient Affidavit of defense—Filed Jan. 8, 1923.

The Plaintiff, the New York & Pennsylvania Company, having moved for judgment in the above stated proceedings against the Pennsylvania Railroad Company, for want of a sufficient affidavit of defense, files the following reasons in support of said motion:

1. As to paragraph 1-13 of the affidavits of defense, all material questions of fact and law sought to be raised therein have been decided by the commission against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31,

of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

2. As to paragraph 14-16 of the affidavits of defense, it appears from Exhibits A-D attached to the statement that the Public Service [fol. 73] Commission found the rate in effect during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and as no appeal was taken, this finding is conclusive upon the defendants, and the right of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission, and its consent obtained, before plaintiff could be entitled to reparation.

3. The award of reparation is valid, though not consented to by the Interstate Commerce Commission as averred in paragraph 14-16 of the affidavits of defense, because under Sec. 208(a) of the Transportation Act:

(a) An award of reparation is not a reduction of a rate requiring the consent of the Interstate Commerce Commission.

(b) Even if a reparation award is construed to be a reduction of a rate, yet as this award was not made until after September 1, 1920, it did not require the consent of the Interstate Commerce Commission, and said Commission had no jurisdiction to approve or disapprove it.

4. Section 208(a) of the Transportation Act applies only to "lines * * * subject to the Interstate Commerce Act," and therefore does not apply to the lines of railroad involved in this proceeding.

5. Upon the termination of Federal control, March 1, 1920, the laws of the States relating to intrastate commerce, including the Pennsylvania Public Service Company Law, which had been suspended during the Federal control, again became operative, and the [fol. 74] Interstate Commerce Commission had no further jurisdiction over intrastate rates, except where discrimination against interstate commerce was alleged. As there is no question of such discrimination in this case, there is no ground for the allegation that recovery of the reparation involved in this proceeding, would be in violation of the Transportation Act, 1920.

T. R. White, B. F. Geary, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 75] IN COURT OF COMMON PLEAS OF CLINTON COUNTY

[Title omitted]

REASONS IN SUPPORT OF MOTION FOR JUDGMENT AGAINST THE NEW YORK CENTRAL RAILROAD COMPANY, ONE OF THE ABOVE-NAMED DEFENDANTS, FOR WANT OF A SUFFICIENT AFFIDAVIT OF DEFENSE—Filed Jan. 8, 1923.

The Plaintiff, the New York & Pennsylvania Company, having moved for judgment in the above stated proceeding against the New York Central Railroad Company, for want of a sufficient affidavit of defense, files the following reasons in support of said motion.

1. As to paragraph- 1-13 of the affidavits of defense, all material questions of fact and law sought to be raised therein have been decided by the commission, against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31, of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

2. As to paragraphs 14-16 of the affidavits of defense, it appears from Exhibits A-D attached to the statement that the Public Service Commission found the rate in effect during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and as no appeal was taken, this finding is conclusive upon the defend- [fol. 76] ants and the right of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission and its consent obtained, before plaintiff could be entitled to reparation.

3. The award of reparation is valid, though not consented to by the Interstate Commerce Commission as averred in paragraphs 14-16 of the affidavits of defense, because under sec. 208, (a) of the Transportation Act:

(a) An award of reparation is not a reduction of a rate requiring the consent of the Interstate Commerce Commission.

(b) Even if a reparation award is construed to be a reduction of a rate, yet as this award was not made until after September 1, 1920, it did not require the consent of the Interstate Commerce Commission, and said Commission had no jurisdiction to approve or disapprove it.

4. Section 208 (a) of the Transportation Act applies only to "lines * * * subject to the Interstate Commerce Act," and therefore does not apply to the lines of railroad involved in this proceeding.

5. Upon the termination of Federal control, March 1, 1920, the laws of the states relating to interstate commerce, including the Pennsylvania Public Service Company Law, which had been suspended during Federal control, again became operative, and the Interstate Commerce Commission had no further jurisdiction over intrastate rates, except where discrimination against interstate commerce was alleged. As there is no question of such discrimination in this case, there is no ground for the allegation that recovery of the reparation involved in this proceeding, would be in violation of the Transportation Act 1920.

T. R. White, B. F. Gray, Attorneys for Plaintiff.

[fol. 77] [File endorsement omitted.]

[fol. 78] In Court of Common Pleas of Clinton County

[Title omitted]

Opinion—Filed July 23, 1923

The plaintiff in its statement of cause of action avers in substance and in paragraphs consecutively numbered, as follows:

1. That it is a large consumer of bituminous coal which is shipped from the Munson and Hawk Run Districts in Central Pennsylvania over the lines of the defendant, The New York Central Railroad Company, to Bald Eagle Junction, Pennsylvania, and thence over the lines of the defendant, the Pennsylvania Railroad Company, to Lock Haven, Pennsylvania, where plaintiff's mills are located.

[fol. 79] 2. That on and prior to February 29, 1920, the freight rates charged and collected by the defendants on coal so shipped, according to their tariffs, were: by the New York Central 70c. and by the Pennsylvania 40c. per ton of 2,240 pounds.

3. That on and prior to February 29, 1920, the lines of the defendants were under Federal control pursuant to Acts of Congress, and on March 1st, 1920, pursuant to an Act of Congress known as the "Transportation Act, 1920," were restored to their owners, the defendants.

4. That prior to March 1, 1920, the plaintiff filed a complaint with the Public Service Commission of Pennsylvania, alleging that the rates above specified were, and upon re-establishment of State authority thereover would be, unjust, unreasonable, excessive, discriminatory and in violation of the Public Service Company Law of Pennsylvania.

5. That an August 25, 1920, while said proceedings were pending and undetermined, pursuant to general increases which were then permitted, and by tariffs duly filed, defendants increased the

joint rate for said transportation of coal from $1.10 to $1.54 per ton, which thereafter was charged and collected.

6. That answers were filed by defendants to said complaint, hearings had and the Commission made its report on August 17, 1921, and entered orders on August 16, 1921, and August 29, 1921, wherein and whereby it found and ordered that the just and reasonable rate for said through movement of coal for the period from March 1, 1920, to August 25, 1920, was $1.00 instead of $1.10 per ton, and that the just and reasonable rate effective August 26, 1920, was $1.40 instead of $1.54 per ton, and that thereafter defendants [fol. 80] filed a petition for a rehearing which was in due course refused. Copies of the report and orders of the Commission above mentioned and of a Supplemental Report and order dated October 18, 1921, are attached to the plaintiff's statement.

7. That the rates of $1.10 charged from March 1, 1920, to August 25, 1920, inclusive, and of $1.54 after August 26, 1920, were unjust, unreasonable, &c.

8. That no appeal was taken from said report and orders or any of them.

9. That between March 1, 1920, and August 31, 1920, both inclusive, there were shipped to plaintiff over defendants' lines 54,830.34 gross tons of coal, for the transportation of which plaintiff paid defendants freight in excess of reasonable rates as aforesaid the sum of $5,484.41 and during the period from August 31, 1920, until November 3, 1921, when the reduced rates became effective by order of the Commission, 119,406.87 gross tons for the transportation of which plaintiff paid defendants $16,708.40 in excess of said reasonable rates, and that plaintiff and defendants agreed upon these amounts and there is no dispute concerning them.

10. That plaintiff consumed all of the coal so shipped to it on which said excess charges were paid and did not pass on to any other person or corporation the loss sustained by reason of its having paid said unlawful rates.

11. That plaintiff filed its petition for reparation for the excess payments on coal moving as aforesaid, that answers were filed by the defendants, and that the case was so proceeded with that on June 20, 1922, two orders were promulgated by the Commission, one directing the defendants to pay to plaintiff reparation for excess charges on shipments moving between March 1, 1920, and August 31, 1920, in the amount of $6,172.97 (interest having been added) [fol. 81] and one for the period from September 1, 1920, to November 3, 1921, in the amount of $17,978.17. Copies of the report and orders of the Commission are attached to the plaintiff's statement.

12. That defendants paid order No. 2 covering reparation in the amount of $17,978.17.

13. That order No. 1, directing defendants to pay the plaintiff the sum of $6,172.97 has not been paid.

The suit is to recover the amount of Order No. 1 with interest from July 20, 1922.

To the plaintiff's statement the defendants have filed separate affidavits of defense. These affidavits differ slightly in form, but in all material respects they are the same. Although each is made up of sixteen consecutively numbered paragraphs in addition to formal introductions and conclusions, it is clear from a careful reading of the whole of the affidavits of defense that they raise only two questions.

In the seventh paragraph of each the defendant denies the allegations contained in the corresponding paragraph of the statement of claim, and avers that the rates therein mentioned (those established under Federal control) are just and reasonable and not in violation of the Public Service Company Law.

The other defense is based on Section 208 (a) of the Transportation Act, 1920, which it is claimed had the effect of forbidding the Public Service Commission of Pennsylvania to award reparation on shipments moving during the guaranty period created by said Transportation Act, namely March 1st, to September 1st, 1920, which coincides with the period in controversy, without the approval of the Interstate Commerce Commission. This defense appears through-[fol. 82] out the affidavits. In paragraph 2 of their affidavits the defendants admit that the freight rates charged and collected on, and for a considerable period prior to February 29th, 1920, were as alleged in paragraph 2 of the plaintiff's statement of claim, but aver that prior to February 29, 1920, the lines of the defendants were under Federal control and that said rates were charged and collected by the President of the United States through the Director General. In paragraph 3 of their affidavits of defense the defendants allege that by the provisions of Section 208 (a) of the Transportation Act, 1920, the freight rates in effect on its lines on February 29, 1920, were continued in effect thereafter until changed by State or Federal authority, or pursuant to authority of law, but that prior to September 1, 1920, no such rate was permitted to be reduced unless by and with the approval of the Interstate Commerce Commission. In paragraph 6 of their affidavits the defendants aver that the (Public Service) Commission's finding as to a just and reasonable rate during the period from March 1st, to September 1, 1920, was "nugatory and of no avail," of no effect "and in violation of Section 208 (a) of the Transportation Act, 1920." In paragraph 11 of their affidavits the defendants allege that so much of the (Public Service) Commission's report as purported to hold that the rates charged by the defendants on shipments moving between March 1st, 1920, and August 31st, 1920, were unreasonable and order No. 1, attached to plaintiff's statement of claim "were in violation of Section 208 (a) of the Transportation Act. 1920, and therefore are of no effect." In paragraph 14 of the affidavits this defense is elaborated somewhat. We quote this paragraph in the affidavit of the Pennsylvania Railroad Company in full:

"14. For a separate and complete defense to the plaintiff's statement of claim this defendant avers that the New York Central Rail- [fol. 83] road Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10 were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit 'A.' This defendant alleges that by Section 208 (a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including Section 208 (a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law."

[fol. 84] The 14th paragraph of the affidavit of defense of the New York Central Railroad Company is substantially the same.

In paragraph 15 of their affidavits of defense the defendants allege

"that order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to the plaintiff's statement of claim as Exhibit "G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208 (a) of the Transportation Act, 1920, and was, therefore, null and void."

In paragraph 8 of their affidavits of defense the defendants admit that no appeal was taken from the report and orders of the Public Service Commission in the original proceedings had before it, wherein and whereby the Commission concluded

"that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive, should be $1 per 2,240

pounds, and effective August 26, 1920, * * * $1.40 per 2,240 pounds,"

and declared that

"upon the presentation of a petition accompanied by supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined."

The plaintiff having obtained a rule to show cause why judgment should not be entered in its favor and against the defendant for want of a sufficient affidavit of defense, and arguments of counsel having [fol. 85] been heard thereon, the case is now before the Court for disposition upon the rule.

In the 9th paragraph of their affidavits of defense the defendants admit that the plaintiff shipped over its lines from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, the amounts of coal therein alleged, and that plaintiff paid the freight charges which exceeded, by the amounts alleged, the freight charges which it would have paid under the rates which the Public Service Commission purported to find reasonable.

The first and second of the reasons assigned by the plaintiff for judgment for want of an affidavit of defense are as follows:

"1. As to paragraph- 1-13 of the affidavit of defense, all material questions of fact and law sought to be raised therein have been decided by the Commission, against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31, of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

"2. As to paragraph- 14-16 of the affidavit of defense, it appears from Exhibits A-D attached to the statement that the Public Service Commission found the rate in effect, during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and [fol. 86] as no appeal was taken, this finding is conclusive upon the defendants and the right, of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission and its consent obtained, before plaintiff could be entitled to reparation."

Section 31 of Article VI of the Public Service Company Law provides:

"Section 31 * * * Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act."

Section 17 of Article VI of the Public Service Company Law, as amended by an act of June 3, 1915, P. L. 779, provides that:

"Within thirty days after filing of any finding or determination by the Commission, or after the date of service of any order—unless an application for a re-hearing may be pending, and then within thirty days after the refusal of such application—or the entry of an order modifying, amending, rescinding or affirming the original finding, determination or order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court: provided that there shall be no appeal from any order for reparation made by the Commission but the suit may be brought as hereinbefore provided. * * *"

We have said that the affidavits of defense raise only two questions. They really raise but one for the claim that the rates estab- [fol. 87] lished by the Federal Government and in force at the beginning of the guaranty period were the only just, reasonable and lawful rates in effect during the whole of that period, is based solely on the contention that the lower rates found by the Public Service Commission to be the just and reasonable rates are invalid because not approved by the Interstate Commerce Commission. The validity of the action of the Public Service Commission, when, on August 17, 1921, it found the just and reasonable rates to be as stated in its report of that date, is, therefore the only matter in controversy. Such a finding necessarily involved the determination that the rates in effect immediately prior to the guaranty period would be unjust and unreasonable if continued into that period. Did it also neccesarily involve and include the determination by the Public Service Commission of its right to prescribe lower rates than those theretofore established by Federal authority and carried over into the guaranty period by force of the Transportation Act, 1920, independently of the Interstate Commerce Commission? We think it did. Obviously and logically a consideration of the right to determine what the just and reasonable rate is precedes the determination of such rate, and the original report of the Public Service Commission evidences consideration and decision of the former question. They say (page 8 of plaintiff's statement) referring to the Transportation Act, 1920, Section 208(a):

"Even if the said act is intended to apply to intrastate rates and to continue in effect for such traffic rates established by the Director General, upon relinquishment from Federal control the State law becomes immediately operative."

And again (page 9 of plaintiff's statement):

"The Transportation Act of 1920, Section 208 (a) establishes the intrastate rates as well as the interstate rates to be effective upon the [fol. 88] termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates 'shall continue in force and effect until thereafter changed by State * * * authority. Congress enacted

the laws which made possible the assumption of control and the operation of the railroads of the country and logically must provide the legislation for the return of those properties to their owners.

"Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners."

That this question was actually raised, considered and decided in the original proceedings is conclusively shown by the following excepts from the Commission's Report in the supplemental proceedings to determine the amount of reparation to which the plaintiff was entitled:

"As to the period covered by Federal Guaranty its (the respondents) position is equally definite: * * *

'It is the defendants' position, first, that since the rates attacked were in effect on February 29, 1920, they continued to be lawful rates for this transportation and that the decision of this Commission in Case No. 3206, insofar as it purported to effect a reduction in the [fol. 89] rates of the defendants for transportation between March 1st, 1920 and September 1st, 1920, was void because not approved by the Interstate Commerce Commission and could, therefore, give the complainant no right to reparation; and, second, that an order in this case requiring the defendants to pay reparation on such shipments would, in effect be an order reducing the rates charged and, without the approval of the Interstate Commerce Commission, would be of no effect under the section of the Transportation Act above quoted.'

"The first of these objections that the rates in effect on March 1st, 1920, and during the six months following were lawful rates was advanced by respondent in the original proceeding (P. U. R., 1921, E p. 80 supra) wherein we determined the reasonable rates. There is no question but that the rates were the lawful rates in the sense that they were 'a collectible rate, or one that may be sued for. Suburban Water Co. vs. Boro. of Oakmont, 268 Pa., 243. The position that the rates in effect on March 1st, 1920, were not revisable by this Commission on complaint is without support in law. In our former opinion we stated: (see pages 10 and 11 of this opinion) * * * and we see no reason for any change, particularly as the parties have not by appellate proceedings sought modification or reversal of our conclusions."

We conclude that the question now raised by these affidavits of defense having been necessarily involved and actually considered and decided in the original proceedings before the Public Service Commission, the defendants are precluded from again raising it in this collateral proceeding. If they desired to question the validity of the findings of the Public Service Commission in this respect,

[fol. 90] without the approval of the Interstate Commerce Commission, their exclusive method of doing so was by appeal to the Superior Court.

The decision of the Public Service Commission on the question of what is a reasonable rate, and of all matters leading up thereto, or necessarily involved therein, is conclusive if not appealed from; and, if an appeal is taken, the decision of the Superior Court thereon is conclusive. New York & Penn'a Co. vs. N. Y. Cent. R. R. Co., 267 Pa., 64.

It would be improper to grant an order of reparation on the hearing of objections to a proposed new schedule of rates. This question does not arise until after the reasonableness of the rate has been finally determined, either by a decision of the Public Service Commission unappealed from, or by the Superior Court on appeal. *Ibid.*

It would, for the same reason, be equally improper to grant an order of reparation on the hearing of a complaint against existing rates, which was the subject matter of the original proceedings before the Public Service Commission in this case.

On a petition for an order of reparation all questions decided, or which might have been raised and decided, on the hearing of objections to the schedule of rates, must be considered as having been finally concluded thereby. N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. If such questions were finally concluded on the hearing of objections to the schedule of rates and could not be raised on a petition for an order of reparation, of course they could not be raised in a suit brought on an order of reparation.

The conclusion at which we have arrived makes it unnecessary for us to consider the merits of the defendants' position based upon the [fol. 91] Transportation Act, 1920, or the other reasons assigned by the plaintiff in support of its motion for judgment for want of a sufficient affidavit of defense, and as no defense other than that already considered has been raised by the pleadings, or suggested, upon the argument, judgment should be entered in favor of the plaintiff and against the defendants for the amount claimed with interest.

Now, July 23, 1923, the rule to show cause heretofore granted, is made absolute, and the Prothonotary is directed to enter Judgment accordingly, amount to be liquidated by him.

By the Court,

E. H. Baird, P. J.

Now, July 23, 1923, the defendants except to the above order and at their request a bill is sealed.

By the Court,

E. H. Baird, P. J. (Seal.)

[File endorsement omitted.]

[fol. 92–95] Bond on Appeal for $14,000—Approved and filed Aug. 8, 1923; omitted in printing

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[fol. 96] In Supreme Court of Pennsylvania, Eastern District, City and County of Philadelphia

Writ of Certiorari and Return—Filed in Common Pleas Court Aug. 11, 1923; in Supreme Court March 14, 1924

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Clinton, Greeting:

We, being willing for certain causes, to be certified of the matter of the Appeal of New York Central Railroad Company and Pennsylvania Railroad Company from the judgment of your said Court at No. 5 of January Term, A. D. 1923, wherein New York & Pennsylvania Company was Plaintiff and the said appellants were Defendants, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the third Monday of March next (1924), so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the Laws of the said State ought.

Witness, the Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, the ninth day of August, in the year of our Lord one thousand nine hundred and twenty-three.

Rudolph M. Schick, Prothonotary pro Tem. (Seal.)

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

By the Court.

E. H. Baird, P. J. (Seal.)

[File endorsement omitted.]

[fol. 97] IN SUPREME COURT OF PENNSYLVANIA IN AND FOR THE EASTERN DISTRICT

NEW YORK & PENNSYLVANIA COMPANY

v.

NEW YORK CENTRAL RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY, Appellants

Appeal from the Court of Common Pleas for the County of Clinton, No. 5, January Term, 1923

ORDER ENLARGING TIME—Filed May 14, 1924

And now, April 25, 1924, it is ordered that fifteen days additional be allowed, in which to hold the record in above case pending the filing of a petition for reargument.

R. v. M., C. J.

True copy from record.

In testimony whereof I have hereunto set my hand and the seal of said Court, at Philadelphia, this 12th day of May, 1924.

Thomas Robins, Prothonotary. (Seal.)

[File endorsement omitted.]

[fol. 98] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ORDER TO HOLD RECORD—Filed Aug. 1, 1924

July 28, 1924.—Motion to hold record filed.

Order

And now, July 26, 1924, it is ordered that the record in the above case be returned to this court and held until August 26th, 1924.

Simpson, J.

True copy from record.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Philadelphia, this twenty-eighth day of July, 1924.

Thomas Robins, Prothonotary. (Seal.)

[File endorsement omitted.]

[fol. 99] In Supreme Court of Pennsylvania, January Term, 1924

Docket Entries

169

New York & Pennsylvania Company, Plaintiff,

v.

New York Central Railroad Company and Pennsylvania Railroad Company, Defendants

Appeal of Defendants from the Judgment

T. R. White, 8/15/23.
Parker McCollester, Henry Wolfe Bikle, Seth T. McCormick, Jr., Henry Hipple.
No. 5, January Term, 1923.
Appeal from Court Common Pleas of the County of Clinton filed August 9, 1923.
Eo die.—Certiorari exit, retble. third Monday March, 1924.
March 12, 1924.—Assignments of Error filed.
March 14, 1924.—Record returned & filed.
March 17, 1924.—Argued.
April 21, 1924.—The judgment is affirmed. Opinion by Sadler, J.

And now, April 25, 1924, it is ordered that fifteen days additional be allowed, in which to hold the record in the above case pending the filing of a petition for reargument.

R. von M., C. J.

May 1, 1924.—Remittitur exit and with record sent to Prothonotary of Clinton Co.
May 12, 1924.—Acknowledgment of remittitur and record received and filed.
May 12, 1924.—Certificate exit and sent to Prothonotary of Clinton Co.
May 13, 1924.—Petition for reargument filed.
May 14, 1924.—Answer to Petition filed.
May 14, 1924.—Record returned and filed.
May 19, 1924.—Opinion filed in this case is temporarily withdrawn. By the Court.
July 8, 1924.—The judgment is affirmed. Opinion by Sadler, J.
July 19, 1924.—Remittitur exit and with record sent to Prothonotary of Clinton Co.
July 25, 1924.—Acknowledgment of Remittitur and record received and filed.
July 25, 1924. Motion to hold record filed.

And now, July 26, 1924, it is ordered that the record in the above case be returned to this court and held until August 26th, 1924.

Simpson, J.

July 28, 1924.—Certificate of Order exit and sent to Prothonotary of Clinton County.

August 1, 1924.—Record returned & filed.

[fol. 100] August 25, 1924, Petition for reargument filed.

Sept. 29, 1924.—Petition refused. Clerical error on page 2 corrected. Per Curiam.

October 6, 1924.—Record returned to: Prothonotary of Clinton Co.

Oct. 17, 1924.—Acknowledgment of record received and filed.

And now, October 18, 1924, it is ordered that the Record in the above entitled case be returned to the Prothonotary of the Supreme Court at Philadelphia, pending application for Writ of Error to the Supreme Court of the United States.

R. v. M., Chief Justice.

Oct. 18, 1924.—Certificate exit and sent to Prothonotary of Clinton Co.

Oct. 21, 1924.—Acknowledgment of Certificate received and filed.

Oct. 21, 1924.—Record returned & filed.

December 18, 1924.—Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Pennsylvania, filed.

December 18, 1924.—Assignments of Error to Supreme Court of the United States filed.

On reading of the petition of The New York Central Railroad Company and The Pennsylvania Railroad Company for writ of error and the assignment of errors, and upon due consideration of the record of said cause:

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Pennsylvania, Eastern District, as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioners and plaintiffs in error give security in the sum of One Thousand Dollars, that the said plaintiffs in error shall prosecute said writ of error to effect and, if said plaintiffs in error fail to make their plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decree on account of said writ of error.

In witness thereof, I have hereunto set my hand this 18 day of December, 1924.

R. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, Eastern District.

December 19, 1924.—Writ of Error from the Supreme Court of the United States filed. Allowed by Hon. Robt. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

December 19, 1924.—Citation, with acceptance of service and order for appearance for Defendant in Error endorsed thereon. [fol. 101] brought into office.

December 19, 1924.—Bond for One Thousand ($1,000) Dollars brought into office. Approved by Hon. Robert von Moschzisker, Chief Justice of Supreme Court of Pennsylvania.

December 19, 1924.—Praecipe for certification of record to the Supreme Court of the United States filed.

[fol. 102] In Supreme Court of Pennsylvania

[Title omitted]

Appeal and Affidavit—Filed Aug. 9, 1923

Enter appeal on behalf of above defendants from the judgment of the Court of Common Pleas of the County of Clinton.

Seth T. McCormick, Jr., Henry Hipple, Attorney for Appellant.

To Thomas Robins, Prothonotary Supreme Court, Eastern District, County of Clinton.

Henry Hipple, the duly authorized attorney for appellants, being duly sworn, saith that said appeal is not taken for the purpose of delay, but because appellant- believe they have suffered injustice by the judgment from which they appeal.

Henry Hipple.

Sworn and subscribed, this 6th day of August, A. D. 1923. Myrtle D. Achuff, Notary Public. My commission expires January 22, 1925. (Seal.)

The names and office addresses of Attorneys for Appellees are as follows: B. F. Geary, Lock Haven, Penna.; Thomas Raeburn White, 700 West End Trust Building, Philadelphia, Penna.

[File endorsement omitted.]

[fol. 103] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL—Filed Aug. 15, 1923

To appellee or his counsel:

You are hereby notified that on August 9th, 1923, an appeal was taken to the Supreme Court in the above-entitled case.

Seth T. McCormick, Jr., Henry Hipple, Attorneys for Appellant.

August 11th, 1923, service of the foregoing notice is hereby accepted; and the prothonotary of the Supreme Court is directed to enter the appearance of the undersigned for the appellee.

T. R. White.

NOTE.—Counsel for Appellant should serve the foregoing notice upon the opposite party or his counsel as required by Rule 58 (printed below) and return it with acceptance of service to the office of the Prothonotary, Room 458 City Hall, Philadelphia, Pa., for filing. If necessary under Rule 58, notice should also be served on the judge of the lower court and the stenographer.

Rule 58.—Immediately upon taking his appeal, appellant shall serve notice thereof on the opposite party or his counsel; and, if the appeal relates to any order, judgment or decree, for which the reasons do not already appear of record, on the judge who entered it; and also, if the official transcript of the evidence needed on the appeal has not been filed, on the stenographer who took it. Upon receipt of such notice, the court below shall forthwith file of record at least a brief statement of the reasons for such order, judgment or decree, in the form of an opinion, which shall be attached to the record and printed; and the official stenographer shall forthwith proceed to have his notes transcribed, approved and filed.

[File endorsement omitted.]

[fol. 104] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 12, 1924

1. The Court erred in making absolute the Rule to show cause why judgment should not be entered against defendants for want of a sufficient Affidavit of Defense; the motion for said Rule, the Reasons in Support thereof, and the Conclusion of the Court thereon, being as follows:

Motion for Judgment (Record, Page 66a)

"And now, to-wit: December 14th, 1922, on motion of Thomas Raeburn White and B. F. Geary, Attorneys for Plaintiff, a rule is granted on the defendants above named to show cause why judgment should not be entered in favor of the plaintiff and against the defendants for want of a sufficient Affidavit of Defense.

Returnable the fourth Monday of January, 1923.

By the Court.

E. H. Baird, P. J."

"And now, 12/16/22, service of within motion accepted and issuance of Rule waived.

McCormick & Hipple and M. E. Haggerty, Attorneys for Defendants."

[fol. 105] Reasons in Support of Motion (Record, Pages 67a, 68a, 69a)

The plaintiff, the New York & Pennsylvania Company, having moved for judgment in the above stated proceeding against the Pennsylvania Railroad Company, for want of a sufficient affidavit of defense, files the following reasons in support of said motion:

1. As to paragraph- 1-13 of the affidavits of defense, all material questions of fact and law sought to be raised therein have been decided by the commission against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31, of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

2. As to paragraph 14-16 of the affidavits of defense, it appears from Exhibit A-D attached to the statement that the Public Service Commission found the rate in effect during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and as no appeal was taken, this finding is conclusive upon the defendants, and the right of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission, and its consent obtained, before plaintiff could be entitled to reparation.

3. The award of reparation is valid, though not consented to by the Interstate Commerce Commission as averred in paragraph 14-16 of the affidavits of defense, because under Sec. 208 (a) of the Transportation Act:

(a) An award of reparation is not a reduction of a rate requiring the consent of the Interstate Commerce Commission.

(b) Even if a reparation award is construed to be a reduction of a rate, yet as this award was not made until after September 1, 1920, it did not require the consent of the Interstate Commerce Commission, and said Commission had no jurisdiction to approve or disapprove it.

4. Section 208 (a) of the Transportation Act applies only to "lines * * * subject to the Interstate Commerce Act," and therefore does not apply to the lines of railroad involved in this proceeding.

5. Upon the termination of Federal control, March 1, 1920, the laws of the States relating to intrastate commerce, including the Pennsylvania Public Service Company Law, which had been suspended during the Federal control, again became operative, and the Interstate Commerce Commission had no further jurisdiction over intrastate rates, except where discrimination against interstate commerce was alleged. As there is no question of such discrimination in this case, there is no ground for the allegation that recovery of the [fol. 106] reparation involved in this proceeding, would be in violation of the Transportation Act, 1920.

T. R. White, B. F. Geary, Attorneys for Plaintiff."

Conclusion of the Court. (Record, Pages 80a to 82a)

"We conclude that the question now raised by these affidavits of defense having been necessarily involved and actually considered and decided in the original proceedings before the Public Service Commission, the defendants are precluded from again raising it in this collateral proceeding. If they desired to question the validity of the findings of the Public Service Commission in this respect, without the approval of the Interstate Commerce Commission, their exclusive method of doing so was by appeal to the Superior Court.

The decision of the Public Service Commission on the question of what is a reasonable rate, and of all matters leading up thereto, or necessarily involved therein, is conclusive if not appealed from; and, if an appeal is taken, the decision of the Superior Court thereon is conclusive. New York & Penn'a Co. vs. N. Y. Cent. R. R. Co., 267 Pa. 64.

It would be improper to grant an order of reparation on the hearing of objections to a proposed new schedule of rates. This question does not arise until after the reasonableness of the rate has been finally determined, either by a decision of the Public Service Commission unappealed from, or by the Superior Court on appeal. Ibid.

It would, for the same reason, be equally improper to grant an order of reparation on the hearing of a complaint against existing rates, which was the subject matter of the original proceedings before the Public Service Commission in this case.

On a petition for an order of reparation all questions decided, or which might have been raised and decided on the hearing of objections to the schedule of rates, must be considered as having been

finally concluded thereby. N. Y. & Pa. Co. vs. N. Y. C. R. R. Co. Supra. If such questions were finally concluded on the hearing of objections to the schedule of rates and could not be raised on a petion for an order of reparation, of course, they could not be raised in a suit brought on an order of reparation.

The conclusion at which we have arrived makes it unnecessary for us to consider the merits of the defendants' position based upon the Transportation Act, 1920, or the other reasons assigned by the plaintiff in support of its motion for judgment for want of a sufficient affidavit of defense, and as no defense other than that already considered has been raised by the pleadings, or suggested, upon the argument, judgment should be entered in favor of the plaintiff and against the defendants for the amount claimed with interest. [fol. 107] Now, July 23, 1923, the rule to show cause heretofore granted, is made absolute, and the Prothonotary is directed to enter judgment accordingly, amount to be liquidated by him.

By the Court.

E. H. Baird, P. J.

Now, July 23, 1923, the defendants except to the above order and at their request a bill is sealed.

By the Court. E. H. Baird, P. J. (Seal.)"

2. The Court erred in its Final Order and Decree, and in directing Judgment to be entered against the Defendants, which said Order and Decree, the Judgment thereon and the Exception taken thereto, are as follows: (Record, page 83a).

Final Decree and Judgment

Now, July 23, 1923, the rule to show cause heretofore granted, is made absolute, and the Prothonotary is directed to enter judgment accordingly, amount to be liquidated by him.

By the Court.

E. H. Baird, P. J.

Now, July 23, 1923, the defendants except to the above order, and at their request a bill is sealed.

By the Court. E. H. Baird, P. J. (Seal.)

And now, July 23, 1923, by the direction of the Court, judgment is entered in favor of the Plaintiff and against the Defendants for the sum of Six Thousand Five Hundred Forty-six 34/100 Dollars, as follows:

Principal	$6,172.97
Interest from July 20, 1922, to July 23, 1923	373.46
Real debt	$6,546.43

Entered July 23, 1923. Judgment, $6,546.43.

L. D. Geo. G. Hickoff, Prothy."

Parker McCollester, Henry Wolf Bikle, Seth T. McCormick, Jr. Henry Hipple, Attorneys for Appellants.

[fol. 108] [File endorsment omitted.]

[fol. 109-111] In Supreme Court of Pennsylvania

[Title omitted]

Order Enlarging Time—Filed April 25, 1924

And now, April 25, 1924, it is ordered that fifteen days additional be allowed, in which to hold the record in the above case, pending the filing of a petition for reargument.

R. von M., C. J.

[File endorsement omitted.]

[fol. 112] In Supreme Court of Pennsylvania

[Title omitted]

Petition for Reargument—Filed May 13, 1924

Now come the appellants and petition the court to grant them a reargument in this case and in support of their petition respectfully show as follows:

I

This case came to this court on appeal from a judgment of the [fol. 113] Court of Common Pleas of Clinton County, Pennsylvania, in an action under Article V, Section 5, of the Public Service Company Law to recover the amount of reparation awarded by the Public Service Commission to the appellee, the plaintiff below, because of the collection by the appellants of freight rates for the transportation of coal from mines in the Munson and Hawk Run Districts consigned to the appellee at Lock Haven, Pa., during the so-called "Guaranty Period," namely, from March 1, 1920, to September 1, 1920, which were alleged to be unreasonable in violation of the provisions of the Public Service Company Law.

II

Argument was had before this court on March 17, 1924, and on April 21, 1924, this court in an opinion written by Mr. Justice Sadler announced its decision affirming the judgment of the court below. The opinion is included herein as Appendix B, page 18.

III

The rates for the transportation of coal from mines in the Munson and Hawk Run Districts to Lock Haven, Pa., have in the past seven or eight years been the subject of numerous changes, changes made voluntarily by the carriers and changes made pursuant to orders of the Public Service Commission, and these rates have also been the subject of consideration in various proceedings before the Public [fol. 114] Service Commission, the Interstate Commerce Commission and the courts of this State. Their history is therefore exceedingly involved and it is difficult even for one who has been closely associated with the various transactions accurately to describe them.

For this reason it is perhaps not surprising that the parties at the argument failed to convey to the court a clear and accurate impression of the facts. Probably because of this, the opinion of the court contains a number of statements with respect to the rates and their history which are in error and it is in order to bring these errors to the court's attention that the appellants petition the court to grant them a reargument.

There are no issues of fact in the case, there being no dispute between the parties as to the material facts involved, and the errors which form the basis for this petition are merely errors which reflect, we believe, a failure to understand these facts as they appear in the record.

IV

The appellants believe that the errors contained in the court's opinion are material, for the court's conclusions seems to be predicated on the facts as stated by it and the opinion of the court leads to the belief that a different conclusion would have been reached had the parties given to the court a correct impression of the facts.

[fol. 115]

V

The appellants believe that the court's opinion reflects an erroneous impression of the facts in the following respects:

(a) In the concluding paragraph of the opinion the court states:

"Had the State Commission previously approved a tariff such as now insisted upon, *or had the Director General of Railroads so ordered and filed it, then the sums fixed would determine the amount chargeable during the period in question* (*Atlantic Coast Line Ry.* v. *R. R. Comm.*, 281 Fed. 321), *but this was not done*, and the rate then becoming due—determined to be proper by the body provided by the State, which passed on this matter, and whose decision is unappealed from—must control." (Italics ours.) (Infra p. 23.)

From the words italicized we take it to be the opinion of the court that if the $1.10 rate had been ordered and filed by the Director General prior to the termination of Federal control it would have

determined the amount of the rates chargeable during the Guaranty Period, and that the court reaches a conclusion contrary to appellants' contention because it finds that the $1.10 rate was not filed by the Director General.

That the court erred in assuming that the rate of $1.10 was not ordered or filed by the Director General is indicated by the following portions of the record:

Paragraph 2 of the plaintiff's statement of claim was as follows:

[fol. 116] "2. On and *prior to February 29, 1920*, the freight rates charged and collected by defendant on coal so shipped, *according to their tariffs duly filed*, consisted of a rate of 70¢ per ton of 2,240 pounds, charged by the defendant, The New York Central Railroad Company, from the mines to Bald Eagle Junction, and a rate of 40¢ per ton charged by the defendant, The Pennsylvania Railroad Company, for the movement from Bald Eagle Junction to Lock Haven, making *a through rate of $1.10 per ton* for the total movement" (Record, p. 6a). (Italics ours.)

In Case No. 3206 the State Commission found as follows:

"The tariff of the Pennsylvania Railroad publishes 40 cents per 2,240 pounds from the Junction (known on the Pennsylvania as Mill Hall Junction) to Lock Haven, thereby constituting a through rate of $1.10 per 2,240 pounds.

These rates were initiated by the Director General and being those in effect on February 29, 1920, became, with the termination of Federal control, the established rates on March 1, 1920, by virtue of the 'Transportation Act, 1920,' entitled 'An Act to provide for the termination of Federal control of railroads and systems of transportation, etc.,' particularly Section 208 (a)" (Record, p. 10a).

* * * * * * *

"The record and the Commission's tariff file clearly establish the fact that the only changes made in the rates here in issue during Federal control from those in effect just prior to Federal control were *in pursuance of General Order No. 28 of the Director General.* The legality and necessity of that order were at least tacitly acknowledged by the Commission in that by Special Permission No. 2367 of August 10, 1920, the increases allowed by Ex Parte 74, 58 [fol. 117] I. C. C. 220-260, which were superimposed upon those made under General Order No. 28 were permitted" (Record, p. 16a). (Italics ours.)

Each of the appellants in paragraph 2 of its affidavit of defense admitted as follows:

"It admits that the freight rates charged and collected for the transportation of coal between the points named in paragraph 2 of the Plaintiff's Statement of Claim were on, and for a considerable period prior to February 29, 1920, as alleged in said paragraph 2; but avers

that *prior to February 29, 1920,* the lines of the defendants were under Federal control and *said rates were charged and collected by the President of the United States through the Director General*" (Record, pp. 34a, 50a). (Italics ours.)

The Interstate Commerce Commission described as follows the establishment of the $1.10 rate:

"On June 25, 1918, an increase of 22.4 cents was added to the 80-cent through rate, under General Order No. 28, and the fraction dropped, making the through rate $1, the rate to Bald Eagle Junction being 60 cents and the rate beyond 40 cents. On July 1, 1919, the alleged error in making the increase of June 25, 1918, was corrected by adding to the through rate of 75 cents, in effect on June 1, 1917, 15 cents, and then adding 22.4 cents, as permitted by General Order No. 28, and dropping the fraction, making the through rate $1.10" (Record, p. 46a).

It is obvious that since the Director General was operating the railroads prior to February 29, 1920 (from December, 1917 to February 29, 1920), anything which was done in initiating rates or filing tariffs during that period was, as a matter of law, done by the Director General.

[fol. 118] The court may have been misled by the fact that the appellee, in the case before the Interstate Commerce Commission, contended that the rate of $1.10 resulted from a failure of the Director General's subordinates correctly to carry out his General Order No. 28 (Record pp. 46a-47a). It is needless to discuss this point further since the Interstate Commerce Commission held that the $1.10 rate was a lawful rate to be charged by the Director General during the period of Federal control (Record, pp. 57a-65a), and under Section 10 of the Federal Control Act (40 Stat. L. 451), the only way in which the Director General could change or initiate rates was by filing them with the Interstate Commerce Commission.

If, therefore, it is the opinion of the court as a matter of law that "had the Director General of Railroads so ordered and filed it (the $1.10 rate), then the sums fixed would determine the amount chargeable during the period in question (Atlantic Coast Line Ry. Co. v. R. R. Comm., 281 Fed. 321)", it follows that from a correct understanding of the facts the court should have concluded that the rate of $1.10 which was charged was the lawful rate and that the judgment of the court below should have been reversed.

The error here discussed, therefore, is obviously a material one.

(b) The opinion of the court indicates that the court has proceeded upon the assumption that the rate of $1.00, the benefit of which is claimed by the appellee, was fixed by the State Commission prior to Federal control. This is indicated by the following language of the court's opinion:

[fol. 119] "At the time it (the Transportation Act) became effective, *there was outstanding the direction of the State Board that the joint charge be one dollar,* though the amount fixed by the govern-

ment was $1.10. On August 26, 1920, by a general order of the Interstate Commerce Commission, a flat rate, increasing by forty per cent the sums collectible, was made: Ex-Parte 74, 58 I. C. C. 220, 260. This resulted in a permissible allowance of $1.40, *if the charge previously fixed by the State Board* was to control, and based on that allowed during the war period, $1.54.' (Italics ours.) (*Infra* pp. 19, 20.)

* * * * * * *

"It will be noted that the original conclusion reached by the Public Service Commission, whereby a reasonable rate was fixed, was not appealed from, and thereby the decision of that tribunal definitely determined the rights of the parties as of *the date prior to federal control, at one dollar,* and was binding on them." (Italics ours.) (*Infra* p. 21.)

However, the determination by the State Commission that the rate should be $1.00, instead of having been made prior to Federal control, was not made until the Commission's decision in Case No. 3206 which was not announced until August 17, 1921, more than one year after Federal control had terminated (Record, pp. 9a-18a), (Plaintiff's Statement of Claim, Record, pp. 6a-7a). Even when this opinion was announced, moreover, the Commission, as will be seen from the opinion itself, made no order establishing a rate of $1.00—its only orders made in connection with the announcement of this decision being orders for the establishment thereafter of a rate of $1.40 (Record, pp. 18a-23a). The Commission made no [fol. 120] order purporting to make applicable to shipments moving during the Guaranty Period or at any other time a rate of $1.00 until the Commission's reparation order in Complaint Docket No. 4738 which is the basis of the present suit and which was not made until more than two years after the termination of Federal control (Record, pp. 29a-30a).

That this error of the court was material is indicated by the fact that it has led the court to an erroneous impression of the issues to be determined, and of the effect of the reparation order of the Public Service Commission which is the basis of the present suit. This is shown by the following language of the court's opinion:

"The rates now under consideration are solely intrastate, and it is for us to determine whether the tariff, fixed and approved by the State authorities, in force prior to the Federal Control Act, shall measure the responsibilities of the parties, or be based on that permitted by the Interstate Commerce Commission, in effect on February 29, 1920. The legislation which controls, provides that there shall be no reduction in rates during the guarantee period, unless approved by the governmental agency, but the action taken here did not effect a lowering in rates during the time fixed, but merely enforced a corrected charge which had been made prior to federal control." (Infra p. 21.)

The State Commission's reparation order did not "merely enforce a corrected charge which had been made prior to Federal

control," since this $1.00 rate was never in effect and was never prescribed prior to Federal control. Therefore, as we contend, the reparation order did attempt to effect a reduction of the rate established by the Director General.

[fol. 121] And, likewise, since the rate of $1.00 which the reparation order seeks to enforce was never ordered prior to Federal control the issue here to be determined cannot be, as the court appears to believe, whether a tariff ordered by the State Commission prior to Federal control became again immediately operative upon the termination of Federal control. The issue to be decided is whether a reparation order of the State Commission made more than two years after the termination of Federal control purporting to give effect to rates lower than the rates which were in effect on February 29, 1920, and which had been held reasonable by the Interstate Commerce Commission, can be enforced without the approval of that body and in spite of the provisions of Section 208(a) of the Transportation Act.

The issue could be as stated in the court's opinion only if the State Commission's reparation order upon which this suit is based gave the appellee the benefit of a rate of 80 cents instead of $1.00, for, as will be seen from the opinion of the Interstate Commerce Commission in New York & Pennsylvania Co. v. Director General, 58 I. C. C. 124, made a part of the appellants' affidavits of defense (Record, pp. 41a-49a), the rate ordered by the State Commission prior to Federal control was a rate of 80 cents made up of the New York Central's rate of 55 cents and the Pennsylvania's rate of 25 cents (Record, pp. 45a-46a).

The court is doubtless misled by the fact that the appellee in its complaint to the State Commission in Complaint Docket No. 3206 claimed that this order of the Commission requiring the 80 cent [fol. 122] rate became operative again after the termination of Federal control, March 1, 1920. However, the State Commission itself ruled that its order prescribing the 80 cent rate did not become operative immediately upon the termination of Federal control (Record, p. 13a). There is, therefore, no issue in the present suit turning upon a rate ordered prior to Federal control, and to the extent that the court has assumed that such was the situation the court's opinion is in error.

For the court's convenience we have included in this petition an appendix (infra p. 15), which sets forth in chronological order the various changes in the rates and the orders of the Commissions.

(c) The court's opinion suggests that the court is of the impression that the opinion of the Commission finding reasonable the rate of $1.00 was approved as final by this court in New York & Pennsylvania Co. v. New York Central, 267 Pa. 64. Such, however, is not the fact. In that proceeding this court was called upon to consider an earlier decision of the Commission rendered in 1917 dealing only with a rate of the New York Central from the mines to Bald Eagle Junction—the New York Central's rate prescribed by the Commission in that proceeding being 45 cents.

(d) In the last paragraph of its opinion the court says:

"From its (the Commission's) *order* no appeal was taken, though permitted by law." (Italics ours.) (Infra p. 23.)

The court erred in assuming as is indicated by the sentence quoted [fol. 123] that in the proceeding before the Commission from which the appellants failed to appeal (Complaint Docket No. 3206) the Commission made an order with respect to the rates charged on the shipments here in question. As has already been pointed out, the Commission expressed the opinion that the rates during the Guaranty Period were unreasonable to the extent that they exceeded $1.00 prior to August 26, 1920, but made no order whatsoever.

It is not clear, of course, whether the court would have concluded that an appeal from the Commission's decision in Case No. 3206 "was permitted by law" had it understood that in connection with that decision the Commission made no order concerning the rates for the period here involved. However, the fact that the Commission made no such order with reference to the rates for this period is one of the reasons urged by the appellants in support of their contention that no appeal could have been taken from the Commission's decision with respect to the issues raised by their affidavits of defense. If the appellants' contentions in this respect are sound the court's impression that the Commission in Case No. 3206 made an order with reference to the rates during the Guaranty Period was a material error.

The appellants' arguments on this point are set forth at length at pages 13 to 46 of our original brief. In connection with the apparently erroneous statement in the Court's opinion, however, we feel that we should point out the difficulty of reconciling the view that an appeal was "permitted by law" from the Commission's decision on [fol. 124] Case No. 3206, with respect to the reparation issue, with the opinion of this court in the case of Lehigh & New England R. R. Co. v. Public Service Commission, 277 Pa. 493, where this court indicated the view, at least as we read the opinion, that an appeal from a decision of the Public Service Commission that a rate was unreasonable, but unaccompanied by an order for reparation, could not bring before the court the question of the power of the Commission subsequently to order reparation on shipments moving during the Guaranty Period.

(e) In view of the sentence quoted from the court's opinion in section (a) of this petition, we feel that we should point out that the following conclusion of law from the same paragraph of the opinion is apparently inconsistent therewith:

"The Transportation Act authorizes the states to change the then existing federal rates, in so far as intrastate carriage is concerned during the guarantee period, without the approval of the Interstate Commerce Commission, for it expressly provided that this could be made by local authority." (Infra p. 23.)

We submit that the court erred in this last quoted clause in that the court failed to give any significance whatsoever to the language of the Transportation Act prohibiting a reduction during the Guaranty Period without the approval of the Interstate Commerce Commission.

We submit further that even if the State Commission prior to the termination of Federal control had ordered a rate of $1.00, or re-[fol. 125] gardless of the rate ordered by the State Commission, the only lawful rate during the Guaranty Period was the rate of $1.10, since this rate was established by the Director General and was in effect on February 29, 1920, since Section 208 (a) of the Transportation Act, 1920, continued this rate in effect thereafter and prohibited any reduction without the approval of the Interstate Commerce Commission prior to September 1, 1920.

VI

Believing that the court in its opinion has proceeded upon an erroneous view of the facts in the particulars hereinbefore indicated, and believing also that these errors had a material effect upon the court's decision, the appellants feel that they should seek an opportunity on reargument to set before the court a correct statement of the facts and the arguments upon such facts.

Wherefore, the appellants pray that the court may grant them the privilege of reargument; that, pending its decision of such reargument, the court may retain the record in this case and may not remit the same to the court below, and that it may make such other or further order as in the premises may be proper.

Respectfully submitted, Henry Wolfe Bikle, Henry Hipple, Seth T. McCormick, Jr., Parker McCollester, Attorneys for Appellants.

May 9, 1924.

[fol. 126] Appendix A—Chronological Table

July 24, 1917.—Pubic Service Commission ordered the New York Central to reduce its rate from 55 cents to 45 cents. (Decision held conclusive because not appealed from in N. Y. & Pa. Co. v. N. Y. C., 267 Pa. 64.)

December 10, 1917.—Public Service Commission ordered New York Central's rate made 55 cents, Pennsylvania's 25 cents—through rate 80 cents.

January 1, 1918.—Federal control—Railroads operated by Director General.

June 25, 1918.—Director General made rates of New York Central 60 cents, of Pennsylvania 40 cents—through rate $1.00.

July 11, 1919.—Director General increased rate of New York Central to 70 cents, Pennsylvania's rate remaining 40 cents—through rate $1.10. This rate remained in effect throughout the balance of Federal control and was in effect on February 29, 1920.

February 29, 1920.—Federal control terminated. Beginning of six months' Guaranty Period under Transportation Act.

June 18, 1920.—Interstate Commerce Commission held rate of $1.10 was reasonable and lawful rate during Federal control and denied appellee's claim for reparation to basis of $1.00 rate on shipments moving prior to and including February 29, 1920.

[fol. 127] August 26, 1920.—Through rate increased to $1.54 pursuant to Interstate Commerce Commission's decision in Ex Parte 74.

September 1, 1920.—End of Guaranty Period.

August 17, 1921*—State Commission announced its decision in Complaint Docket No. 3206 that rates of $1.10 and $1.54 were unreasonable after Federal control and that reasonable rate on shipments from March 1, 1920, to August 26, 1920, would have been $1.00, and on shipments after August 26, 1920, $1.40. Ordered railroads to file tariffs naming rate of $1.40 for future, but made no order with respect to Guaranty Period. Supplemental orders with respect to rates for future made on August 29 and October 18, 1921.

October 28, 1921.—Rate for future reduced to $1.40 pursuant to such orders.

February 6, 1922.—Appellee filed complaint with Public Service Commission (Complaint Docket 4738), asking reparation to basis of rate of $1.00 on shipments from March 1, 1920 to August 26, 1920, and $1.40 from August 26, 1920 to October 28, 1921.

June 20, 1922.—Public Service Commission ordered appellants to [fol. 128] pay reparation to basis of rates of $1.00 on shipments from March 1, 1920 to August 26, 1920 and $1.40 on shipments after August 26.

October 19, 1922.—Appellants having declined to pay reparation on shipments during Guaranty Period because the Interstate Commerce Commission had not approved the reduction of the Guaranty Period rates, appellee brought this suit to recover the amount awarded by the Commission.

*It was the failure of appellants to appeal from this decision of the Commission which the Court below held made this decision conclusive on complainant's right to reparation on shipments moving during the Guaranty Period, although the Commission at the time of this decision made no order with respect to the Guaranty Period but expressly announced that a further petition should be presented for an award of reparation on past shipments.

[fol. 129]

Appendix B

(128)

EASTERN DISTRICT

No. 169, January Term, 1924

NEW YORK & PENNSYLVANIA COMPANY

vs

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation of the State of New York, and the Pennsylvania Railroad Company, a Corporation of Pennsylvania, Appellants.

Appeal from the Judgment of the Court of Common Pleas of Clinton County, Pennsylvania, to No. 5, January Term, 1923

Filed, April 21, 1924

SADLER, J.:

The New York Central Railroad transported coal from the Munson and Hawk Run Mining Districts to Bald Eagle Junction, from which it was moved by the Pennsylvania Railroad Company to Lock Haven, all being points within the State. In 1917, the Public Service Commision made an order requiring the two companies to fix a proportional rate of sixty-five cents per gross ton for the service performed. This was later in the same year increased to eighty cents.

Thereafter, the President of the United States took over the operation of all railroads, pursuant to the powers granted by the Federal [fol. 130] Control Act, and exercised power as to both interstate and intrastate corporations until March 1, 1920: Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135. The previous tariffs filed by the defendant companies were then in force, and, by virtue of a reparation order made by the Public Service Commission, a recovery was had against the New York Central Railroad Company, for the excess charges which had been made preceding that period. Later, the joint rate allowed on shipments of the character referred to was increased to one dollar. By virtue of Federal permission, as declared by the Interstate Commerce Commission, it was fixed at $1.10, notwithstanding the order of the State authorities.

Government control ceased on February 29, 1920, but the Transportation Act, then made effective, attempted to protect for six months the railroads returned to their owners. It provided as follows: "All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which, on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but, prior to

September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce such rate, fare, or charge unless such reduction or change is approved by the Commission." At the time [fol. 131] it became effective, there was outstanding the direction of the State Board that the joint charge be one dollar, though the amount fixed by the government was $1.10. On August 26, 1920, by a general order of the Interstate Commerce Commission, a flat rate, increasing by forty per cent the sums collectible, was made: Ex-parte 74, 58 I. C. C. 220, 260. This resulted in a permissible allowance of $1.40, if the charge previously fixed by the State Board was to control, and based on that allowed during the war period, $1.54.

A request for further reparation was made by the plaintiff company, it having paid on the basis of the Federal allowance in effect on March 1, 1920. The Public Service Commission of the State sustained the contention that the rate which it had fixed, and was unappealed from (N. Y. & Pa. Co. vs. N. Y. C. R. R. Co., 267 Pa. 64), should control, and not that fixed by order of the government, during the period of the war. The argument of the defendants rests on that phrase in the Transportation Act which says that charges shall not be reduced during the six-months' period, and, in calculating the amount payable, the government rate, in force prior to February 29, 1920, shall control.

This makes necessary a consideration of the Congressional legislation, already referred to, which provides that rates shall not be reduced, unless approved by the Interstate Commerce Commission during the time therein specified. Our Public Service authorities, in the reparation order—and it may be noted that the Interstate Commerce Commission had no power to direct any reparations—[fol. 132] separated the periods before and after September 1, 1920, and, in the first decree, directed repayment on the basis of sums collected in excess of the original allowance of one dollar per ton, and, in the second, the amounts received beyond $1.40. As to the latter, payment was made as directed, but, as to the former, it was refused, and the result was this litigation, which ended in a judgment in favor of the plaintiff for want of a sufficient affidavit of defense, and this appeal followed.

It will be noted that the original conclusion reached by the Public Service Commission, whereby a reasonable rate was fixed, was not appealed from, and thereby the decision of that tribunal definitely determined the rights of the parties, as of the date prior to Federal control, at one dollar, and was binding on them (N. Y. & Pa. Co. vs. N. Y. C. R. R. Co., 267 Pa. 64). The original order fixing the rate, followed by the direction for reparation, made on the basis suggested, was the subject of litigation, but the affirmance of the judgment then entered terminated this controversy.

The rates now under consideration are solely intrastate, and it is for us to determine whether the tariff, fixed and approved by the State authorities, in force prior to the Federal Control Act, shall

measure the responsibilities of the parties, or be based on that permitted by the Interstate Commerce Commission, in effect on February 29, 1920. The legislation which controls, provides that there shall be no reduction in rates during the guarantee period, unless approved by the governmental agency, but the action taken here did not affect a lowering in rates during the time fixed, but merely [fol. 133] enforced a corrected charge, which had been made prior to Federal control.

Section 208a, above referred to, provides that the rates shall continue, until changed by State or Federal authority. During the war, both classes of charges were subject to Federal regulation, but this act, "confers no power on the Commission to deal with the intrastate rates. What * * * is to be done by the Commission 'in the exercise of its powers (is) to prescribe just and reasonable rates; i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. * * * It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce" (R. R. Com. of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563, and note, 22 A. L. R. 1100; of State of N. Y. v. U. S. and Interstate Commerce Comm., 257 U. S. 591; Texas v. Eastern Texas R. R. Co., 258 U. S. 204). As was well stated by Justice Kephart: "After the Act of 1920, the control by the Interstate Commerce Commission was (1) [fol. 134] to establish a level of rates which would afford the compensation necessary to permit the maintenance of an adequate national railway system during the prescribed period; (2) to remove discriminations against interstate commerce as a whole arising from the enforcement by State authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic, aimed at persons or localities, by any intrastate rate schedule" (L. & N. E. R. R. Co. vs. Pub. Ser. Co., 277 Pa. 493, 501).

The Transportation Act authorizes the States to change the then existing Federal rates, insofar as intrastate carriage is concerned during the guarantee period, without the approval of the Interstate Commerce Commission, for it expressly provided that this could be made by local authority. On the termination of Federal supervision, the State regulation of the rates became, by its own force, effective (N. Y. C. R. R. Co. v. Pub. Ser. Com., 268 Fed. 558.) Had the State Commission previously approved a tariff such as now in-

sisted upon, or had the Director General of Railroads so ordered and filed it, then the sums fixed would determine the amount chargeable during the period in question (Atlantic Coast Line Ry. Co. v. R. R. Comm., 281 Fed. 321), but this was not done, and the rate then becoming due—determined to be proper by the body provided by the State, which passed on this matter, and whose decision is unappealed from—must control. From its order no appeal was taken, though permitted by law, and it follows that plaintiff was entitled to recover for the overcharges on the tonnage admittedly billed and paid for at the higher rate. The assignments of error should, therefore, be overruled.

The judgment is affirmed.

[fol. 134½] May 19, 1924—Opinion filed in this case is temporarily withdrawn. (Signed) by the Court.

[fol. 135] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ANSWER TO PETITION FOR REARGUMENT—Filed May 14, 1924

The Court made no error of fact; the points raised by appellants in their petition for re-argument are based upon a misapprehension of what the Court said in its opinion.

(a) Petition for Reargument, Page 4.—Appellants assume that the Court was under the impression that the rate of $1.10 had not been ordered filed by the Director General of Railroads. We do not so understand the opinion and directly the opposite is stated by the Court (p. 19). Where the Court says: "Had the State Commission previously approved a tariff such as now insisted upon or had the Director General of Railroads so ordered and filed it," the tariff would have been legal and enforcible, etc., we understand the Court to have reference to the tariff which formed the basis of the $1.10 rate.

[fol. 136] The principal objection to the rate of $1.10 was that it was constructed upon an illegal rate which the State Commission had condemned. With this thought in mind, it is clear that what this Court meant in the portion of its opinion quoted by appellants was that the State Commission had not previously approved, but had condemned, the tariff which entered into and became the basis of the $1.10 rate afterwards promulgated by the Director General of Railroads; this also makes perfectly clear the reference by the Court to that rate "so ordered and filed" by the Director General. The use of the word "so" clearly shows that what the Court had reference to was the ordering and filing of a rate lawfully constructed upon a rate previously approved by the State Commission. It is thus apparent that there was no error of fact in the Court's opinion in the state-

ment that "this was not done." It is a fact that the $1.10 rate was not lawfully constructed upon a rate previously approved by the State Commission, and therefore it was not "so ordered and filed" by the Director General.

(b) Petition for Reargument, Page 7.—The alleged error of fact mentioned under (b) is based upon the same misapprehension of the Court's opinion. The part particularly objected to is: "At the time it (the Transportation Act) became effective, there was outstanding the direction of the State Board that the joint charge be one dollar, though the amount fixed by the government was $1.10."

This is strictly correct when it is understood to mean, as it clearly does when read in its context, that the joint charge of $1.00 was correct when based upon the rate which had been approved by the [fol. 137] State Board. In that sense the charge of $1.00 had been directed by the State Board, for the basis thereof had been so directed, and this was the necessary result of the Court's statement. There was, therefore, no error of fact.

(c) Petition for Reargument, Page 11.—There is nothing in the Court's opinion which suggests that it thought the rate of $1.00 was "approved as final" in New York and Penna. Co. v. New York Central, 267 Pa. 64. The Court did indicate, as is the fact, that that rate had the approval of the State Commission because the basis thereof has been approved by the Commission and by this Court in the case cited. General Order 28, as set forth in the briefs originally filed in this case, lawfully increased all the rates. The rate of $1.10 was illegal because it was constructed upon a rate which the State Commission had held unlawful in the case cited. The application of General Order 28 was purely formal and mechanical. The real question in any rate constructed thereby was whether the correct base rate had been used.

(d) Petition for Reargument, Page 11.—The criticism of the Court's opinion which is set forth under (d) is a mere criticism of words. It is alleged that the State Commission made no order when it made a finding that the rates were unreasonable. Such a finding is in effect an order and is commonly so denominated. The Court does not give any indication that is supposed any order was made except the order finding the rates unreasonable and fixing the amounts which were found to be reasonable.

[fol. 138] (e) Petition for Reargument, Page 13.—The criticism of the Court's opinion under (e) is a mere allegation of inconsistence which disappears in the light of what has already been said in this answer.

We submit that the petition should be dismissed.

T. R. White, Counsel for Appellee.

[File endorsement omitted.]

[fol. 139] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

OPINION—Filed July 8, 1924

SADLER, J.:

The New York Central Railroad Company was engaged in the transportation of coal from the Munson and Hawk Run Mining Districts to Bald Eagle Junction, from which place it was moved by the Pennsylvania Railroad Company to Lock Haven, all of the points named being within the State of Pennsylvania. In 1916, certain tariffs were filed by the former with the Public Service Commission, and in July 1917, after protest, an order was made requiring the first named railroad to reduce the charge for transportation to forty-five cents. The Public Service Act gives the right to a complete judicial review on independent judgment where a company is aggrieved by any order of the Commission, through an appeal to the Superior Court, and thence by special allowance to this Court, and as no appeal was taken from the decision rendered, the action of the Commission is conclusive in a subsequent proceeding for reparation covering the excessive charge demanded and paid: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., 267 Pa. 64. Subsequent to federal control, in obedience to the statutory direction, this Court enforced the Commission's order, subject, of course, to the limitations imposed by the [fol. 140] Public Service Act,—not material here to be discussed. We accepted, as bound to do, the rate fixed by the Commission as a reasonable one for the service rendered: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. Later, in December of 1917, the Commission ordered a new rate of eighty cents between the points already referred to, to be divided between the New York Central and Pennsylvania Railroads.

On December 28, 1917, by proclamation of the President, duly authorized by Act of Congress, and made necessary by the war emergency, control of all railroads was placed in the hands of the Director General. In pursuance of the authority granted to him, a through rate of one dollar was named on June 25, 1918. On July 11, 1919, the charge was advanced, by virtue of general order No. 28, to $1.10, and this remained in effect during the further term of federal administration, which ended February 29, 1920.

The order so authorizing permitted the increase on the basis of the tariff filed by the railroads in 1916, determined, in July 1917, by the Public Service Commission to be unreasonable. The rate base thus adopted was therefore unlawful, and one not determined on a reasonable charge fixed for the interstate service, as it was required to be, but on an illegal, disapproved tariff filed with the Public Service Commission, and which had been subsequently lowered. As adopted, it made allowable a charge of $1.10 per gross ton instead of one dollar.

Under the Federal Act of March 21, 1918, the Director General exercised full power in the management of the roads engaged in both

interstate and intrastate commerce, with the right, subject to approval by the Interstate Commerce Commission, to fix the rates which should be charged (Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135), and as the same directly or indirectly affected the former class of service, was given the same privilege for the period from March 1, 1920, when governmental control ceased, to the following September, covering six months, known as the guarantee period.

[fol. 141] The provisions of the Transportation Act became effective after February 29, 1920. An effort was made to protect the owners of railroads for the period of six months, and it was provided as follows: "All rates, fares and charges, and all classifications, regulations and practices in any way changing, affecting, or determining any part, or the aggregate of rates, fares or charges, or the value of the service rendered, which, on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but, prior to September 1, 1920, no such rate, fare or charge shall be reduced and no such classification, regulation or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

At the time this legislation became in force there was outstanding the rate fixed by the federal authorities, and approved by the Interstate Commerce Commission, of $1.10 for the haulage of coal between the points in question, and, on August 26, 1920, by general order, a flat increase of forty percent of the sums then collectible was allowed: Ex Parte 74, 58 I. C. C. 220, 260. This resulted in giving the appellants the right to charge $1.54, if the sum allowable by governmental permission prior to March 1, 1920, was to control, but otherwise, if the reasonable sum determined by the Public Service Commission of the State was used as a structural base, in which case the rate should have been one dollar, beginning March 1, and rising to $1.40 on August 26.

It may be noted that, on complaint to the Interstate Commerce Commission, a rate of $1.10 was held to be fair in a proceeding in which the present litigants were also parties, and that this decision was rendered subsequent to March 1, but it will also be observed that the question of reasonableness was not the only issue presented, the [fol. 142] Commission saying that the manner in which the rate was arrived at is only one element in determining what was a proper sum to be charged. This ruling was made on June 18, 1920, but it is insisted that after March 1 of that year, insofar as intrastate rates were concerned, the Public Service Commission of Pennsylvania had the right to determine the question. On the other hand, the appellants urge that no reduction could be permitted during the guaranteed period without consent of the Interstate Commerce Commission, and therefore the appellees are precluded in their present claim, based on the order of reparation later made by the local regulatory body.

Prior to March 1, 1920, a second complaint, which may hereafter be referred to as complaint No. 3206, alleging improper charges, now the subject of controversy, was presented to the State Commission. A final conclusion was not reached until August 17, 1921, and that body held the reasonable pay for shipments from March 1 to August 26, should be one dollar, and for the period thereafter, $1.40. This, in effect, sustained the rate base made by the same Commission in 1917, as it passed through the successive increases made during federal control, making due allowance for those advances. From this decision no appeal was taken, though permissible, and required under the Public Service Act, as it touched or affected all matters heard and considered. Section 31, of article VI, provides: "Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act, the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act" (Act July 26, 1913, P. L. 1374), and section 17, as amended, directs that this shall be done within a period of thirty days (Act June 3, 1915, P. L. 779). A failure to so proceed operates as a waiver of the right to review: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. From the order fixing the reasonable rate no review was asked, and the appellants are now debarred from complaining of the ruling made.

[fol. 143] It is important to remember that in the proceeding before the State Board on the second complaint (3206), which passed upon the disputed rates fixed during federal control, the appellants here asserted that the Public Service Commission had no power to reduce the rates between March 1, 1920 and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then the railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction of rates, and claimed such order was "nugatory and of no avail." The issue was then squarely joined as to whether the Commission had power within itself to hear and determine the reasonableness of a rate between March 1 and September 1, 1920, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants denied any authority to intermeddle with the rate in any manner until the federal tribunal had acted or authorized it to be done.

The Public Service Commission, at that time, decided that immediately upon the return of the railroads to a pre-war status, its authority to control followed, and they became "subject to the Public Service Company Law," insofar as relates to intrastate rates, which class of cases was exclusively under the control of the State Commission.

With the record in this condition, it is apparent the parties have voluntarily submitted to a tribunal competent to hear their complaint and contention. It was imperative, if an adverse decision was rendered, that those feeling aggrieved should follow the mode pointed out by the act of assembly. If no appeal was taken, then section

31, of article VI, made all rulings between the parties conclusive. "Defendant attempted to re-raise the question decided in the first proceeding, but this is could not then or thereafter do, not because the facts and law there laid down were res adjudicata in the usual acceptation of that term, but because, by article VI, section 31, of [fol. 144] the act, defendant's failure to appeal made all those rulings 'conclusive upon all parties affected thereby' "; N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra, p. 70. And, as further stated in L. & N. E. R. R. Co. v. Pub. Ser. Com., supra, p. 499, the ruling included the findings on which the order was based. It is elementary that where a party makes a defense before a tribunal competent to hear the cause, upon a question either of fact or law, and the conclusion is adverse, he must pursue the statutory remedy, otherwise he is bound by the decision rendered.

Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, it is possible a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3206, and squarely passed upon by the Commission, is evidenced not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the court. It was only after our decision in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493, that a change of attitude by the defendants took place.

We are of opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval.

That this is so is further apparent. Considerable stress is laid on the so-called final order, and article VI, section 31, of the Public Service Act is quoted as the basis of appellants' contention that the State Commission's order in the second complaint did not involve a consideration of the rates during the guarantee period. That this is obviously incorrect appears not only from the findings made, but also from the decision of our court in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493. "When the Commission shall determine, after hearing * * * upon complaint, that the rate * * * [fol. 145] [is] unjust * * * [it shall] determine and prescribe by specific order the * * * reasonable rate * * * to be thereafter established, demanded, exacted, charged or collected." This is in the precise language of the act of assembly. The order could relate only to rates in the future. But as stated in the Lehigh Case (page 499): "The appeal to the Superior Court opened all challenged findings relating to the contested rate; the final decree was not the only matter to consider * * * Questions on the findings are not to be taken up piecemeal.—that is, for the future under this appeal, and the reasonableness of the past rate on an appeal from a reparation award * * * The Superior Court did not err in considering all questions presented to the commission or arising under the complaint." Appellants' counsel admit that had the Commission, in complaint No. 3206, being the second one, issued an

order with respect to the rates during the guarantee period, the situation now under consideration would be different, for such order would have raised at once the question of its power to make and enforce it. The record shows that after having debated the relative positions of the parties, as hereinabove indicated, and discussed the evidence, the Commission made this finding and definitive order: "Upon all of the facts of record we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive [this being the guarantee period], should be $1 per 2,240 pounds, and effective August 26, 1920, the date of the 40 per cent increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2,240 pounds. Respondents will be directed by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40," being the rate here complained of. This order was made without any qualifications, and, as indicated, without any suggestion of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal. At that time this appellant was [fol. 146] notified by the Commission that upon the presentation of a petition, accompanied by supporting date, reparation would be awarded for freight charges paid in excess of the rates herein determined, further emphasizing the determination of the Commission that the matter was exclusively within its own control.

In 1922, the Public Service Commission was asked to grant reparation to the appellees for the sums paid in excess of the dollar rate for the period from March 1, 1920, to August 26 of the same year, and $1.40 thereafter, and to award a sum which would equal the overcharges, and this resulted in an allowance to the petitioners. The sum claimed for the excess collection during the so-called guarantee period mentioned forms the foundation of the present suit. A statement of claim was filed, and an affidavit of defense interposed, which the learned court below held to be insufficient, with the result that judgment was entered for the plaintiff.

As noted, the defense rests on the proposition that the rate fixed as reasonable by the Public Service Commission of the State is ineffective, in that no approval of the Interstate Commerce Commission was secured to reduce rates during the guarantee period, and it is insisted such action was required under the terms of the Transportation Act. This overlooks the provision of the Congressional legislation that no changes shall be made unless approved "by state or federal authority." It is clear that the local rates were held in abeyance during the period of federal control, and, as far as interstate commerce is concerned, remained subject to the action of the Interstate Commerce Commission until September 1, 1920, but after March 1 of that year, insofar as intrastate rates were concerned, the control of the State Commission again became effective: L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493; see, L. & N. E. R. R. Co. v. Pub. Ser. Com., 79 Pa. Superior Ct. 540. As said by Judge Kephart in the decision first cited: "After the Act of 1920, the control of the

Interstate Commerce Commission was to establish a level of rates which would afford the compensation necessary to permit the main-
[fol. 147 & 148] tenance of an edquate national railway system during the prescribed period; (2) remove discrimination against interstate commerce as a whole arising from the enforcement by state authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic aimed at persons or localities by any intrastate rate or schedule."

Prior to the Transportation Act and the taking over of the railroads by the government, it is clear the Interstate Commerce Commission had no control over matters affecting intrastate transportation, including the rates charged by such carriers, except as their enforcement caused discrimination against interstate commerce: R. R. Com. of Wisconsin v. C., B. & Q. R. R. Co., 257 U. S. 563; New York v. U. S., 257 U. S. 591; Texas v. Eastern Texas R. R., 258 U. S. 204. Here, admittedly, the shipments are of the former class alone, and do not affect the movement of freight from one state to another. During the war, the federal government controlled both classes, but beginning with March 1, 1920, the federal rights were limited, and, as already noted, the determination of reasonableness of charges was either within the jurisdiction of the "state or federal authority," depending on the character of the traffic, and other effective limitations of the Transportation Act.

In the present instance, the State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly illegal premise, and make it conform to one determined as reasonable prior to federal control. The decision enforces the order of reparation determined on that basis, making due allowance for increases which had from time to time been authorized by the Director General. As we have stated, no appeal by any party who felt aggrieved was taken from the final order, as required by our acts of assembly. We are convinced that judgment for the plaintiff was properly entered by the court below, and, without separate discussion, the assignments of error are overruled.

The judgment is affirmed.

[fol. 149] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

MOTION AND ORDER TO HOLD RECORD—Filed July 25, 1924

New York Central Lines

DEAR SIR: I have been out of the City since the last opinion of the court in the above case was handed down and have not as yet had an opportunity to study it carefully. As a result I have been unable as yet to reach a conclusion as to whether we shall seek a reviewal of the decision or let the matter drop. As I previously intimated the

Federal question which is involved is one of considerable importance to us and we have felt that it might be necessary to seek a decision on the question by the United States Supreme Court. On the other hand, from such little study as I have given to the opinion there is a doubt in my mind whether the facts have yet been fully understood and there is a possibility that we may feel constrained to make still another application to your court for a reconsideration of the case.

In any event we desire an opportunity to study the opinion and determine what action should be followed and I am therefore writing to you to ask that the record be held for a short time and be not remitted to the lower court until we have had a reasonable opportunity to consider the opinion further and determine the procedure which we shall adopt. Unfortunately for another week or so I [fols. 150 & 151] have to be out of the City engaged in other matters and will therefore be unable to deal with the present case carefullly at once. I am therefore constrained to ask that the record be held for an additional thirty (30) days.

Yours very truly, Parker McCollester, Assistant General Solicitor. ATG.

Copy to: T. Raeburn White, Esq., 700 West End Trust Building, Philadelphia, Pa.; Henry Wolfe Bikle, Esq., General Attorney Pennsylvania Railroad System, Philadelphia, Pa.

[File endorsement omitted.]

[fol. 152] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR REARGUMENT—Filed Aug. 25, 1924

On April 21, 1924, this Court filed its original opinion in this case. The appellants believing that the opinion indicated that the Court had not been given a correct impression of the pertinent facts, filed with the Court a petition for reargument. The Court did not grant a reargument, but the original opinion of the Court was withdrawn and on July 8, 1924, the Court filed another opinion written, as was the first, by Mr. Justice Sadler.

[fol. 153] It is with regret that we feel constrained once more to apply for a reargument on behalf of the appellants. In its second opinion the court has correctly stated the material facts with reference to the dates of the changes in the freight rates under consideration. However, we believe that the Court has not yet been correctly advised as to certain facts which from its opinion appear to be material and that probably as a result of this there are what we believe to be erroneous statements of fact and conclusions in the opinion which we believe should be brought to the Court's attention. This circumstance impels us once more to petition the Court for a reargument

in order to point out the errors which we believe exist in the Court's statement of the facts and the conclusions which it has reached thereon.

In support of this petition we submit that the Court has erred in the following respects:

I

The Court erred if its decision was based upon the assumption that the issues sought to be raised by the affidavits of defense were raised and decided by the Public Service Commission in Case 3206.

In his opinion Mr. Justice Sadler states as follows:

"It is important to remember that in the proceeding before the State Board on the second complaint (3206), which passed upon the disputed rates fixed during federal control, the appellants here asserted that the Public Service Commission had no power to reduce [fol. 154] the rates between March 1, 1920, and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then the railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction of rates, and claimed such order was 'nugatory and of no avail.' *The issue was then squarely joined as to whether the Commission has power within itself to hear and determine the reasonableness of a rate between March 1 and September 1, 1920, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants denied any authority to intermeddle with the rate in any manner until the federal tribunal had acted or authorized it to be done.*

The Public Service Commission, at that time, decided that immediately upon the return of the railroads to a pre-war status, its authority to control followed, and they became 'subject to the Public Service Company Law,' insofar as relates to intrastate rates, which class of cases was exclusively under the control of the State Commission.

With the record in this condition, it is apparent the parties have voluntarily submitted to a tribunal competent to hear their complaint and contention. It was imperative, if an adverse decision was rendered, that those feeling aggrieved should follow the mode pointed out by the act of assembly. If no appeal was taken, then Section 31, of Article VI, made all rulings between the parties conclusive. 'Defendant attempted to reraise the question decided in the first proceeding, but this it could not then or thereafter do, not because the facts and law there laid down were res adjudicata in the usual acceptance of that term, but because, by Article VI, Section 31, of the act, defendant's failure to appeal made all those rulings conclusive upon all parties affected thereby,' N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra, p. 70. And, as stated in L. & N. E. R. R. Co v. Pub. Ser. Com., supra, p. 499, the ruling in- [fol. 155] cluded the findings on which the order was based. It is elementary that where a party makes a defense before a tribunal competent to hear the cause, upon a question either of fact or law,

and the conclusion is adverse, he must pursue the statutory remedy, otherwise he is bound by the decision rendered.

Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, it is possible a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3206, and squarely passed upon by the Commission, is evidenced not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the Court. It was only after our decision in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493, that a change of attitude by the defendants took place.

We are of the opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval." (Italics ours.)

The portion of the opinion quoted indicates that it was the view of the Court that the issue raised by the affidavits of defense and here relied upon was raised by the railroads and decided in Case 3206 before the Public Service Commission. We believe that if the Court has gained this impression from the record the impression is erroneous and that it has resulted from a misunderstanding either of the issues before the Public Service Commission or of the contentions of the appellants in this case, or both.

The language quoted, and particularly the portion in italics, sug- [fol. 156] gests that the Court has conceived that the issue raised by the affidavits of defense and the issue decided by the Public Service Commission was whether the State Commission without the approval of the Interstate Commission had the power to enter upon an investigation and make a decision with respect to the unreasonableness of the carriers' rates during the Guaranty Period. Such a conception is contrary to the facts. The railroads, as will be seen later, have never contended before the Public Service Commission that the Transportation Act, 1920, prevented the State Commission from entering upon such an investigation of their rates during the Guaranty Period and from making a decision that these rates were unreasonable. However, even if such an issue had been raised before the Public Service Commission, it is not the issue which is presented by the defense in this case.

Our defense in this case is that in view of Section 208(a) of the Transportation Act, 1920, the Court may not give judgment for the appellee in a proceeding based upon an order of the State Commission for the payment of reparation on shipments moving during the Guaranty Period unless the Intrastate Commerce Commission either before or after the action of the State Commission but at some time before the entry of such a judgment has approved a reduction of the rates applicable to those shipments below the rates in effect on February 29, 1920. We submit that the issue here to be determined is whether or not this is a good defense.

[fol. 157] (a) This Issue Was Not Raised by the Parties in the Proceedings Before the Commission

In the proceeding before the Commission two issues were raised by the complaint, the complainant alleging, first, that the rate of $1.10 would be unlawful after the termination of Federal control merely because it was in excess of the rate prescribed by the State Commission in December, 1917, and second, that if this were not so the rate would nevertheless be unreasonable.

It is true that in connection with both of the allegations of the complaint the defendants invoked Section 208(a) of the Transportation Act, 1920, but not in such a way as to raise the issues presented by their affidavits of defense in this case. In meeting the first contention of the complainant before the State Commission the contention of the railroads under Section 208(a) of the Transportation Act, 1920, was that in view of this section without further action on the part of the State authorities it could not be held that the Commission's order of December, 1917, was again applicable with full force and effect upon the termination of Federal control. On this point the Commission decided in favor of the defendants' contention as will be seen from the portion of the Commission's report appearing on pages 13(a) and 14(a) of the record in this case. With respect to the second allegation of the complaint the defendants frankly admitted the jurisdiction of the State Commission to consider and determine whether their rates were reasonable after the termination of Federal control, and upon this issue they invoked Section 208(a) of the Transportation Act, 1920, only in support of their contention that it placed the burden of [fol. 158] proof upon the complainant. On this point the Commission held against the railroads as is disclosed by the portion of the Commission's report set forth at the top of page 15(a) of the record herein.

No contention was made by the defendants at that time nor has any such contention been made since that Section 208(a) prevented the State Commission from proceeding to consider and make a decision with respect to the reasonableness of the rates after the termination of Federal control and it was never contended that the approval of the Interstate Commerce Commission was essential before the State Commission could undertake the consideration of the propriety of the rates.

The railroads, however, while making no issue with respect to the power of the Commission to pass upon the reasonableness of their rates asserted that in the event the Commission should hold the rates unreasonable, the approval of the Interstate Commerce Commission would be necessary before a reduction in the rates could be made effective. This assertion was entirely with respect to something which could only occur in the future after a decision that the rates were unreasonable and did not in any way bring in question the power of the Commission to enter upon the investigation with respect to the reasonableness of the rates.

The position of the railroads and the respects in which the provisions of the Transportation Act, 1920, were invoked by them in Case 3206 before the Commission are clearly stated at page 16 of the railroads' brief in that proceeding, a copy of which is hereto [fol. 159] attached for the Court's information. The railroads said at pages 15 and 16:

"In fact the power of a State to deal with rates is expressly recognized. Under the law there is nothing which purports to prevent a State Commission from considering an intrastate rate and ordering a reduction in any rate it finds to be unreasonable, subject of course to the qualification that because of the Federal guaranty such reduction must, prior to September 1, 1920, be approved by the Interstate Commerce Commission."

* * * * * * *

"The conclusion to which our reasoning leads and which, we submit, is that to which the Commission must adhere, is that Section 208(a) of the Transportation Act applies to intrastate rates and that it is constitutional. The necessary result is that all rates continued in effect pursuant thereto are lawful, but that this Commission has jurisdiction to consider the $1.10 rate to determine whether or not it is now reasonable. It may not order it reduced solely because it exceeds the rate fixed by this Commission in its order of December 10, 1917, but may do so, only after a finding based upon proper and conclusive evidence in this case, that the rate is unreasonably high. And even then its order for reduction must be approved by the Interstate Commerce Commission if it is to take effect prior to September 1, 1920."

The Court may have been misled by the statement of the Commission in the reparation proceeding, Case 4738, which is set forth at page 25(a) of the record herein, that the railroads contended that the Commission's decision in Case 3206 was void in so far as it attempted to effect a reduction in the rates during the Guaranty [fol. 160] Period without the Interstate Commerce Commission's approval. This contention was no more than this, that had the Interstate Commerce Commission given its approval to a reduction in the rates after the State Commission had announced its decision in Case 3206 and approved the application of the $1.00 rate therein found reasonable by the State Commission to shipments moving during the Guaranty Period, the decision in Case 3206 coupled with such approval would have constituted a proper foundation for a claim for reparation, but that without such approval the decision afforded no cause of action to the complainant for reparation. In other words, one of the two steps which were necessary to the recovery of reparation had not been fulfilled and therefore the complainant's right to reparation had not been completed. This was not, therefore, a contention by the carriers that in Case 3206 the Commission had no power to make the decision it did, but was simply a contention that

that decision remained an ineffective thing in the absence of the approval of the Interstate Commerce Commission to give it life.

We believe, moreover, that there is a clear distinction between making a decision that rates are unreasonable and making effective a reduction of those rates as applied to specific shipments pursuant to such a decision, and we believe it is because of its failure to make this distinction that the Court has fallen into the error of assuming that the issues raised by the affidavits of defense were decided by the Public Service Commission in Case 3206, while in fact they relate only to the making effective of a reduction in rates with respect to particular shipments.

[fol. 161] Under the Public Service Company Law the Commission's method of requiring that a reduction be made effective is by an order directing the carrier to establish the reduced rates or to refund by way of reparation to the shipper the difference between the rates charged and the rates found reasonable. This is clear from the provisions of the statute from which it will be seen that although the Commission may have made a decision that rates should be reduced, a railroad does not incur the penalties of the statute by continuing to charge the higher rates. It is only when the Commission has made an order directing the railroad to establish the reduced rates that the continuance of the higher rates becomes a violation of the statute for which a penalty is imposed. Likewise, in the case of a decision with respect to rates charged on past shipments, a mere decision that these rates were unreasonable does not give a shipper a cause of action in Court to recover the difference between the rates charged and the rates found reasonable by the Commission. It is only after the Commission has made and served upon the railroad an order to pay reparation and the carrier has failed to comply with the order that the shipper can proceed in Court, using the order as the basis of the suit.

So far as we can see the distinction between an opinion by a Commission that a rate is unreasonable and an order based thereon is the same as the distinction between the opinion of a Court and an order of the Court pursuant thereto. Until a Court's order has been entered no action has been taken requiring compliance with the views expressed in the Court's opinion.

[fol. 162] The only order which the Commission made in Case 3206 was with respect to rates for the future. As to the rates charged on shipments moving prior to the time when the Commission's decision was announced, all that the Commission did was to express its opinion that the rates were unreasonable. The only order possible to give effect to this opinion as to past shipments was an order for reparation and the Commission expressly stated that it withheld the making of such an order until subsequent proceedings.

Had the State Commission in Case 3206 issued a reparation order with respect to the shipments moving during the Guaranty Period such action might be held to constitute a decision by it that it had the power to make such an order. Even in that event, however, the appellants would urge that the issues raised by the affidavits of defense

were not decided by the Commission because the defense, here relied upon by the appellants, is not that the Commission was without power to order the payment of reparation, but is that a Court may not enforce such an order without the Interstate Commerce Commission's approval. Although we have denied the validity of the Commission's reparation order, such denial is based, not upon the contention that the approval of the Interstate Commerce Commission was required before the State Commission made its order, but upon the contention that this approval is required before the Court enforces the order by giving judgment thereon. The Commission has no power to enforce compliance with its orders and therefore a Court proceeding is necessary if the order is not voluntarily complied with. [fol. 163] At any time before the institution of the present suit the approval of the Interstate Commerce Commission might have been obtained, but since this was not done we contend that the order, lacking such approval, did not afford the basis of a cause of action which the Court can enforce and that the giving of judgment would constitute a direct violation of Section 208 (a) of the Transportation Act, 1920.

It must be apparent that the Commission even if in Case 3206 it had made an order requiring the payment of reparation was not undertaking to decide that a Court might give judgment upon such an order without the Interstate Commerce Commission's approval.

It must be even more apparent that this issue was not decided by the Commission when it did not even make a reparation order, but merely announced its opinion that the rates were unreasonable and withheld its action on the complainant's prayer for reparation until a subsequent proceeding.

We submit that the Commission's report in Case 3206 will be searched in vain for any language which can be construed as a decision by the State Commission that it would make a reparation order with respect to the shipments moving during the Guaranty Period without the prior approval of the Interstate Commerce Commission and much less that any language can be found in the report which can be said to constitute a decision that such a reparation order if made could be enforced by a Court without the Interstate Commerce Commission's approval.

[fol. 164] The Commission was not asked, "Will you give the complainant an order for reparation if it proves damage, and may the complainant collect this reparation straightway by means of a Court judgment without obtaining the Interstate Commerce Commission's approval with respect to the shipments moving during the Guaranty Period?" All that the Commission was asked was, "Were the rates which were charged on the complainant's shipments unreasonable and will you in a later proceeding give the complainant an order for reparation if it proves damage?" This is the only question which the Commission was called upon to answer and the only question which it decided in Case 3206.

We therefore submit that the issues raised by the affidavits of defense upon which the appellants rely were not decided by the Commission in Case 3206.

(b) These Issues Could Not Have Been Before the Commission for Decision in Case 3206

The contention which the appellants make is that two steps were required to make the rate of $1.00 effective as to shipments moving during the Guaranty Period. One of these steps was the decision of the State Commission that the rate was unreasonable and that the complainant had been damaged and was entitled to reparation. The other step was the approval by the Interstate Commerce Commission of a reduction during the Guaranty Period of the rate of $1.10 to $1.00. We do not contend that either of these steps was a condition precedent to the other. All that we do contend is that before payment of the reparation could be inforced both of them must have occurred.

[fol. 165] Since the approval of the Interstate Commerce Commission might have been given after as well as before the action by the State Commission, we submit that, since the Commission did no more than to decide that the rate was unreasonable, this decision could not have involved a decision that a reparation order could be enforced without the Interstate Commerce Commission's approval and that such decision of the question in Case 3206 would have been entirely premature. The complainant although given an opportunity to do so might never have sought reparation, or might never have produced proof of its alleged damage, or before it did so the approval of the Interstate Commerce Commission might have been secured so that the issues raised by the affidavits of defense might never have arisen. Can it be said that the Commission could decide issues which, for all that was known at the time its opinion was rendered, might never come before it?

II

The Court has erroneously applied to this case the principles announced in New York & Pennsylvania Company v. New York Central R. R. Co., 267 Pa. 64.

The Court in its opinion refers to language in its decision in the case of Lehigh & New England v. Pub. Serv. Com., 277 Pa. 493 where it cites its decision in the earlier New York & Pennsylvania Company Case in support of the proposition that questions on the findings of the Commission are not to be taken up piecemeal, that is, [fol. 166] for the future under one appeal and as to the reasonableness of the past rate on an appeal from a reparation award.

The distinction between the situation to which that proposition applies and the situation in the present case is that here the defendants do not contest the decision of the State Commission as to rates for the future and their objection to the payment of reparation is an objection which has no application to such rates. In the earlier New York & Pennsylvania Case the carrier contended that the Commission's decision was contrary to the weight of the evidence. This was a contention equally applicable to rates for the future and rates

for the past and there was reason, therefore, why the Court should say that it should not be called upon to review the question twice. And in the Lehigh & New England Case the carrier was actually appealing from the decision of the Commission both as to reparation and as to rates for the future. In the present case the defendants make no contention that the Commission's decision was contrary to the evidence and they do not contest the Commission's decision as to the future rates—their only contention being with respect to the effect of the Transportation Act upon shipments during the Guaranty Period, which contention was in no sense applicable to the rates for the future since when the Commission's decision was announced the Guaranty Period had long since expired.

[fol. 167] III

The Court's decision in the present case is in conflict with its decision in the case of Lehigh & New England v. Pub. Ser. Comm., supra.

*I*t its opinion the Court remarks that it was only after the decision in the Lehigh & New England Case that the appellants adopted their present attitude. That such is not the fact is apparent from the circumstances that the Lehigh & New England Case was not decided until April 30, 1923, while on June 1, 1920, the carriers filed their brief before the Public Service Commission in Case 3206 in which the position outlined is identical with that to which the railroads have since adhered.

However, the Court's decision in the Lehigh & New England Case did confirm the appellants in their opinion and we find it impossible now to reconcile the decision in the case at bar with the views which the Court announced in that case.

In its opinion in the Lehigh & &New England Case this Court held, if we read its language aright, that the Transportation Act, 1920, did not prevent the filing of a complaint with the State Commission relating to rates during the Guaranty Period or the consideration of such rates by the State Commission, and that the Interstate Commerce Commission must approve a reduction in the rates before such reduction became effective, but that this approval might be accorded either before or after the action of the State Commission. Thus the Court said:

[fol. 168] "Section 208(a) does not prohibit a complaint from being filed against a rate established during federal control for the guarantee period. It does prohibit a reduction in rates without the approval of the Interstate Commission."

* * * * * * *

It is not necessary to state action, that a conditional approval from Washington be first obtained. Section 208(a) reads, "No such rate * * * shall be reduced * * * unless the reduction * * * is approved." There must be prior action somewhere to secure an approval. The act of Congress intended the Interstate

Commerce Commission to act as a reviewing body over rates during the guarantee period, determining whether the reduction is a proper one, having in view the purposes of the act."

Since it was then the view of the Court that the approval of the Interstate Commerce Commission might be given after as well as before action by the State Commission, how can it now be held that an appeal from the decision of the State Commission was necessary in order to bring up for review the question of the necessity for the Interstate Commerce Commission's approval. An appeal from a decision of the Public Service Commission could be necessary in order to obtain a review on the question of the effect of the lack of the Interstate Commerce Commission's approval only if such approval was a necessary condition precedent to the State Commission's decision.

Moreover, in the Lehigh & New England Case this Court not only indicates the view that the Interstate Commerce Commission's approval may be given after the State Commission has acted as well as before, but holds, as we read the opinion, that the question of the [fol. 169] necessity for this approval in a claim for reparation cannot be made the subject of an appeal from a decision of the State Commission that the rates were unreasonable since such decision unaccompanied by an order for reparation does not damage the railroad. We can derive no other meaning from the following language of the Court (503):

Without considering the proceedings before the Interstate Commerce Commission on the complaint there filed, and, assuming the state's action was on a rate not before assailed, if we affirm this order the carrier is not injured until the state commission's order is approved by the federal commission, and afterwards only on an order of reparation."

We therefore submit that the present decision is directly in conflict with the decision in the Lehigh & New England Case and that it leaves the law with respect to the procedure to be followed in reviewing decisions of the Public Service Commission in such a state of confusion that the Court should grant a reargument in order to clarify the situation.

IV

The Court erred if it concluded that by their failure to appeal from the State Commission's decision in Case 3206 the appellants waived the defense which they here assert. If the issues now raised were not and could not have been decided by the Commission in Case 3206 and if, as we contend, no appeal could have been taken from that decision which would bring up for review these is- [fol. 170] sues, it necessarily follows that the appellants by failing to appeal did not waive their right to have the issues determined by the Court.

V

The Court erred in directing judgment for the appellee since this amounted to giving effect to the Public Service Company Law of Pennsylvania contrary to the provisions of the Transportation Act, 1920, and the Court erred in failing to hold that Section 208(a) of the Transportation Act, 1920, and the lack of the Interstate Commerce Commission's approval of a reduction of the rates constituted a complete defense to the appellee's cause of action.

That which is prohibited by Section 208(a) of the Transportation Act, 1920, is a reduction of the rates charged. The opinion of the Court is in error in that it results in denying to the Federal statute its controlling effect by enforcing a reduction of the rates.

This is the more apparent when it is observed that the provision for an appeal from the State Commission to the Courts upon which the Court's opinion seems in large part to be predicated is contained only in the Public Service Company Law and that the provisions of the Public Service Company Law can have application to shipments moving during the Guaranty Period only in accordance with the provisions of the Transportation Act, 1920. If the Transportation Act, 1920, is to be controlling, as we submit it must be, the ship-
[fol. 171] ments moving during the Guaranty Period could be subject to the provisions of the State law only as provided in the Transportation Act itself and if, as in this case, the requirements of the Transportation Act, 1920, were not complied with the appellee with respect to these shipments could derive no rights under the Public Service Company Law and the provisions of the Public Service Company Law remained inapplicable to the situation.

VI

The Court erred in stating in the third paragraph of its opinion with respect to the $1.10 rate established by the Director General that:

"The rate base thus adopted was therefore unlawful, and one not determined on a reasonable charge fixed for the interstate service, as it was required to be, but on an illegal, disapproved tariff filed with the Public Service Commission, and which had been subsequently lowered."

The rate of $1.10 established by the Director General could only have been unlawful if contrary to the provisions of the Federal Control Act or if held unreasonable by the Interstate Commerce Commission. The Interstate Commerce Commission expressly held that the rate was a reasonable and lawful rate and therefore the Court's statement that it was unlawful is incorrect.

[fol. 172] VII

The fourth paragraph of the Court's opinion is as follows:

"Under the Federal Act, the Director General exercised full power in the management of the roads engaged in both interstate and

intrastate commerce, with the right, subject to approval by the Interstate Commerce Commission, to fix the rates which should be charged, (*Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135) and as the same directly or indirectly affected the former class of service, *was given the same privilege for the period from March 1, 1920, when governmental control ceased, to the following September, covering six months, known as the guarantee period.*" (Italics ours.)

The language quoted, and particularly the words italicized, indicate that it was the view of the Court that the Director General exercised authority over the rates charged during the Guaranty Period. Such is, we believe, an inaccurate statement of the law. The Director General's power to fix rates for the carriers expired with the termination of Federal control and the control of the rates during the Guaranty Period which was provided for by the Transportation Act, 1920, was to be exercised by the Interstate Commerce Commission and not by the Director General

[fol. 173]

VIII

In the next paragraph of its report the Court states:

"The provisions of the Transportation Act became ineffective after February 29, 1920, except as therein directed."

Inasmuch as the Transportation Act, 1920, was not approved until February 28, 1920, it is not, we believe, strictly accurate to say it became "ineffective" after February 29, 1920. A more correct statement of the law, we submit, would be that the authority of the Federal Government over intrastate rates became ineffective after February 29, 1920, except as provided in the Transportation Act, 1920, and the Interstate Commerce Act.

IX

In the seventh paragraph of its opinion, in referring to the decision of the Interstate Commerce Commission in which that Commission approved the $1.10 rate for the period of Federal control, the Court says:

"The question of reasonableness was not the only issue presented."

It will be observed from the opinion of the Interstate Commerce Commission appearing at page 48(a) of the record that the Interstate Commerce Commission said:

"The only issue which is properly before us is the justness and reasonableness of the rate which is assailed."

[fol. 174]

X

In the last paragraph of its opinion the Court states as follows:

In the present instance, the State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly illegal premise, and make it conform to one determined as reasonable prior to federal control."

We submit that this statement is in error. If judgment is recovered in accordance with the Court's decision the appellee will have obtained the transportation of its shipments during the Guaranty Period at a rate of $1.00 per ton. The rate which was in effect on February 29, 1920, and which was held reasonable by the Interstate Commerce Commission for transportation during the period of Federal control was $1.10. We submit that whatever reasons the State Commission may have had for finding that $1.00 was a reasonable rate, nevertheless, the enforcement of judgment in accordance with the Court's opinion would amount to a reduction of ten cents below the rate in effect at the termination of Federal control.

XI

To summarize the appellants' contention; we submit that aside from what may be called the minor errors in its opinion—the inaccurate statements which have been indicated, the Court made two serious errors and as a result reached an erroneous conclusion.

[fol. 175] First. The Court erred in concluding that even under the Public Service Company Law the failure of the railroads to appeal from the State Commission's decision in Case 3206 rendered the affidavits of defense insufficient since the issues raised thereby were not decided by the Commission and could not have been made the subject of an appeal.

Second. The Court erred in failing to conclude that regardless of the provisions of the Public Service Company Law the appellee could not recover since, because the Interstate Commerce Commission had not approved a reduction in the rates charged on appellee's shipments during the Guaranty Period below those in effect on February 29, 1920, the enforcement of judgment for the appellee would be in direct violation of Section 208(a) of the Transportation Act 1920, whose provisions must be controlling, a State statute to the contrary notwithstanding.

XII

Believing that the Court in its opinion has proceeded upon an erroneous view of the facts and the law in the particulars hereinbefore indicated, and believing also that these errors had a material effect upon the Court's decision, the appellants feel that they should seek an opportunity on reargument to set before the Court a correct statement of the facts and their arguments upon such facts.

[fol. 176] Wherefore, the appellants pray that the Court may grant them the privilege of reargument; that, pending its decision on such reargument, the Court may retain the record in this case and may not remit the same to the Court below, and that it may make such other or further order as in the premises may be proper.

Respectfully submitted, Henry Wolf Bikle, Henry Hipple, Seth T. McCormick, Jr., Parker McColester, Attorneys for Appellants.

August 25, 1924.

[fol. 177] In the Supreme Court of Pennsylvania, Eastern District

No. 169, January Term, 1924

New York & Pennsylvania Company

v.

New York Central Railroad Company, a Corporation of the State of New York, and the Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania, Appellants

Appeal from the Judgment of the Court of Common Pleas of Clinton County, Pennsylvania, to No. 5, January Term, 1923

Filed July 8, 1924.

Sadler, J.:

The New York Central Railroad Company was engaged in the transportation of coal from the Munson and Hawk Run Mining Districts to Bald Eagle Junction, from which place it was moved by the Pennsylvania Railroad Company to Lock Haven, all of the points named being within the State of Pennsylvania. In 1916, certain tariffs were filed by the former with the Public Service Com- [fol. 178] mission, and in July, 1917, after protest, an order was made requiring the first named railroad to reduce the charge for transportation to forty-five cents. The Public Service Act gives the right to a complete judicial review on independent judgment where a company is aggrieved by an order of the Commission, through an appeal to the Superior Court, and thence by special allowance to this Court, and as no appeal was taken from the decision rendered, the action of the Commission is conclusive in a subsequent proceeding for reparation covering the excessive charge demanded and paid; N. Y. & Pa. Co. v. N. Y. C. R. R. Co., 267 Pa. 64. Subsequent to Federal control, in obedience to the statutory direction, this Court enforced the Commission's order, subject, of course, to the limitations imposedby the Public Service Act,—not material here to be discussed. We accepted, as bound to do, the rate fixed by the Commission as a reasonable one for the service rendered: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. Later in December of 1917, the Com-

mission ordered a new rate of eighty cents between the points already referred to, to be divided between the New York Central and Pennsylvania Railroads.

On January 1, 1918, due to the war emergency, control of all railroads was placed, by Act of Congress, in the hands of the Director General, and, in pursuance of the authority granted to him on June 25, 1918, a through rate of one dollar was named. On July 11, 1919, the charge was advanced by virtue of general order No. 28, to $1.10, and this remained in effect during the further term of Federal administration, which ended February 29, 1920. [fol. 179] The order so authorizing permitted the increase on the basis of the tariff filed by the railroads in 1916, determined, in July, 1917, by the Public Service Commission to be unreasonable. The rate base thus adopted was therefore unlawful, and one not determined on a reasonable charge fixed for the interstate service, as it was required to be, but on an illegal, disapproved tariff filed with the Public Service Commission, and which had been subsequently lowered. As adopted, it made allowable a charge of $1.10 per gross ton instead of one dollar.

Under the Federal Act, the Director General exercised full power in the management of the roads engaged in both interstate and intrastate commerce, with the right, subject to approval by the Interstate Commerce Commission, to fix the rates which should be charged (Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135), and as the same directly or indirectly affected the former class of service, was given the same privilege for the period from March 1, 1920, when Governmental control ceased, to the following September, covering six months, known as the guarantee period.

The provisions of the Transportation Act became ineffective after February 29, 1920, except as therein directed. An effort was made to protect the owners of railroads for the period of six months, and it was provided as follows: "All rates, fares and charges, and all classifications, regulations and practices in any way changing, affecting, or determining any part, or the aggregate of rates, fares or charges, or the value of the service rendered, which, on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until there- [fol. 180] after changed by State or Federal authority, respectively, or pursuant to authority of law; but, prior to September 1, 1920, no such rate, fare or charge shall be reduced and no such classification, regulation or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

At the time this legislation became in force there was outstanding the rate fixed by the Federal authorities, and approved by the Interstate Commerce Commission, of $1.10 for the haulage of coal between the points in question, and, on August 26, 1920, by general order, a flat increase of forty percent of the sums then collectible was allowed: Ex Parte 74, 58 I. C. C. 220, 260. This resulted in giving the appellants the right to charge $1.54, if the sum allowable by governmental permission prior to March 1, 1920, was to

control, but otherwise, if the reasonable sum determined by the Public Service Commission of the State was used as a structural base, in which case the rate should have been one dollar, beginning March 1, and rising to $1.40 on August 26.

It may be noted that, on complaint to the Interstate Commerce Commission, a rate of $1.10 was held to be fair in a proceeding in which the present litigants were also parties, and that this decision was rendered subsequent to March 1, but it will also be observed that the question of reasonableness was not the only issue presented, the Commission saying that the manner in which the rate was arrived at is only one element in determining what was a proper sum to be charged. This ruling was made on June 18, 1920, but it is insisted that after March 1 of that year, insofar as intrastate rates were [fol. 181] concerned, the Public Service Commission of Pennsylvania had the right to determine the question. On the other hand, the appellants urge that no reduction could be permitted during the guarantee period without consent of the Interstate Commerce Commission, and therefore the appellees are precluded in their present claim, based on the order of reparation later made by the local regulatory body.

Prior to March 1, 1920, a second complaint, which may hereafter be referred to as complaint No. 3206, alleging improper charges, now the subject of controversy, was presented to the State Commission. A final conclusion was not reached until August 17, 1921, and that body held the reasonable pay for shipments from March 1 to August 26, should be one dollar, and for the period thereafter, $1.40. This, in effect, sustained the rate base made by the same Commission in 1917, as it passed through the successive increases made during Federal control, making due allowance for those advances. From this decision no appeal was taken, though permissible, and required under the Public Service Act, as it touched or affected all matters heard and considered. Section 31, of Article VI, provides: "Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act, the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act" (Act July 26, 1913, P. L. 1374), and Section 17, as amended, directs that this shall be done within a period of thirty days (Act June 3, 1915, P. L. 779). [fol. 182] A failure to so proceed operates as a waiver of the right to review; N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. From the order fixing the reasonable rate no review was asked, and the appellants are now debarred from complaining of the ruling made.

It is important to remember that in the proceeding before the State Board on the second complaint (3206), which passed upon the disputed rates fixed during Federal control, the appellants here asserted that the Public Service Commission had no power to reduce the rates between March 1, 1920, and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then the

railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction of rates, and claimed such order was "nugatory and of no avail." The issue was then squarely joined as to whether the Commission had power within itself to hear and determine the reasonableness of a rate between March 1 and September 1, 1920, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants — denied any authority to intermeddle with the rate in any manner until the Federal tribunal had acted or authorized it to be done.

The Public Service Commission, at that time, decided that immediately upon the return of the railroads to a pre-war status, its authority to control followed, and they became "subject to the Public Service Company Law", insofar as relates to intrastate rates, which class of cases was exclusively under the control of the State Commission.

[fol. 183] With the record in this condition, it is apparent the parties have voluntarily submitted to a tribunal competent to hear their complaint and contention. It was imperative, if an adverse decision was rendered, that those feeling aggrieved should follow the mode pointed out by the act of assembly. If no appeal was taken, then Section 31, of Article VI, made all rulings between the parties conclusive. "Defendant attempted to reraise the question decided in the first proceeding, but this it could not then or thereafter do, not because the facts and law there laid down were res adjudicata in the usual acceptation of that term, but because, by Article VI, Section 31, of the Act, defendant's failure to appeal made all those rulings 'conclusive upon all parties affected thereby' ": N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra, p. 70. And, as further stated in L. & N. E. R. R. Co. v. Pub. Ser. Com., supra, p. 499, the ruling included the findings on which the order was based. It is elementary that where a party makes a defense before a tribunal competent to hear the cause, upon a question either of fact or law, and the conclusion is adverse, he must pursue the statutory remedy, otherwise he is bound by the decision rendered.

Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, it is possible a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3205, and squarely passed upon by the Commission, is evidence not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the Court. It was only after our decision in L. & [fol. 184] N. E. R. R. Co. v. Pub. Ser. Com. 277 Pa. 493, that a change of attitude by the defendants took place.

We are of opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval.

That this is so is further apparent. Considerable stress is laid on the so-called final order, and Article VI, Section 31, of the Public

Service Act is quoted as the basis of appellants' contention that the State Commission's order in the second complaint did not involve a consideration of the rates during the guarantee period. That this is obviously incorrect appears not only from the findings made, but also from the decision of our Court in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493. "When the Commission shall determine, after hearing * * * upon complaint, that the rate * * * (is) unjust * * * (it shall) determine and prescribe by specific order the * * * reasonable rate * * * to be thereafter established, demanded, exacted, charged or collected." This is in the precise language of the act of assembly. The order could relate only to rates in the future. But as stated in the Lehigh case (page 499): "The appeal to the Superior Court opened all challenged findings relating to the contested rate; the final decree was not the only matter considered * * * Questions on the findings are not to be taken up piecemeal,—that is, for the future under this appeal, and the reasonableness of the past rate on an appeal from a reparation award * * * The Superior Court did not [fol. 185] err in considering all questions presented to the Commission or arising under the complaint." Appellants' counsel admit that had the Commission, in complaint No. 3206, being the second one, issued an order with respect to the rates during the guarantee period, the situation now under consideration would be different, for such order would have raised at once the question of its power to make and enforce it. The record shows that after having debated the relative positions of the parties, as hereinabove indicated, and discussed the evidence, the Commission made this finding and definitive order: "Upon all of the facts of record we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive (this being the guarantee period), should be $1 per 2,240 pounds, and effective August 26, 1920, the date of the 40 per cent increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2,240 pounds. Respondents will be directed by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40," being the rate here complained of. This order was made without any qualifications, and, as indicated, without any suggestion of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal. At that time this appellant was notified by the Commission that upon the presentation of a petition, accompanied by supporting data, reparation would be awarded for freight charges paid in excess of the rates [fol. 186] herein determined, further emphasizing the determination of the Commission that the matter was exclusively within its own control.

In 1922, the Public Service Commission was asked to grant reparation to the appellees for the sums paid in excess of the dollar rate for the period from March 1, 1920, to August 26 of the same year, and $1.40 thereafter, and to award a sum which would equal the

overcharges, and this resulted in an allowance to the petitioners. The sum claimed for the excess collection during the so-called guarantee period mentioned forms the foundation of the present suit. A statement of claim was filed, and an affidavit of defense interposed, which the learned Court below held to be insufficient, with the result that judgment was entered for the plaintiff.

As noted, the defense rests on the proposition that the rate fixed as reasonable by the Public Service Commission of the State is ineffective, in that no approval of the Interstate Commerce Commission was secured to reduce rates during the guarantee period, and it is insisted such action was required under the terms of the Transportation Act. This overlooks the provision of the Congressional legislation that no changes shall be made unless approved "by State or Federal authority." It is clear that the local rates were held in abeyance during the period of Federal control, and, as far as interstate Commerce is concerned, remained subject to the action of the Interstate Commerce Commission until September 1, 1920, but after March 1 of that year, insofar as intrastate rates were concerned, the control of the State Commission again became effective: L. & N. E. R. R. Co. v. Pub. Ser. Com. 277 Pa. 493; see, L. & N. E. R. R. Co. v. Pub. Ser. Com., 79 Pa. Superior Ct. 540. As said by Judge Kephart [fol. 187] in the decision first cited: "After the Act of 1920 the control of the Interstate Commerce Commission was to establish a level of rates which would afford the compensation necessary to permit the maintenance of an adequate national railway system during the prescribed period; (2) remove discrimination against interstate commerce as a whole arising from the enforcement by State authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic aimed at persons or localities by any intrastate rate or schedule."

Prior to the Transportation Act and the taking over of the railroads by the Government, it is clear the Interstate Commerce Commission had no control over matters affecting intrastate transportation, including the rates charged by such carriers, except as their enforcement caused discrimination against interstate commerce; R. R. Com. of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563; New York v. U. S., 257 U. S. 591; Texas v. Eastern Texas R. R., 258 U. S. 204. Here, admittedly, the shipments are of the former class alone, and do not affect the movement of freight from one State to another. During the war, the Federal Government controlled both classes, but beginning with March 1, 1920, the Federal rights were limited and, as already noted, the determination of reasonableness of charges was either within the jurisdiction of the "State or Federal authority," depending on the character of the traffic, and other effective limitations of the Transportation Act.

In the present instance, the State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly [fol. 188] illegal premises, and make it conform to one determined as reasonable prior to Federal control. The decision enforces the order of reparation determined on that basis, making due allowance for increases which had from time to time been authorized by the

Director General. As we have stated, no appeal by any party who felt aggrieved was taken from the final order, as required by our acts of assembly. We are convinced that judgment for the plaintiff was properly entered by the Court below, and, without separate discussion, the assignments of error are overruled.

The judgment is affirmed.

[fols. 189 & 190] Sept. 29, 1924.—Petition refused. Clerical error on page 2 corrected. (Signed) Per Curiam.

[fol. 191 & 192] In Supreme Court of Pennsylvania

[Title omitted]

Order for Return of Record—Filed Oct. 18, 1924

And now, October 18, 1924, it is ordered that the Record in the above entitled case be returned to the Prothonotary of the Supreme Court at Philadelphia, pending application for Writ of Error to the Supreme Court of the United States.

R. von M., Chief Justice.

[File endorsement omitted.]

[fol. 193] In Supreme Court of Pennsylvania

Petition for Writ of Error—Filed Dec. 18, 1924

To the Honorable Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania:

The petition of the New York Central Railroad Company and the Pennsylvania Railroad Company respectfully shows as follows:

I. The New York Central Railroad Company is a corporation organized and existing under the laws of the State of Pennsylvania and other states. It is engaged as a common carrier of passengers and freight in interstate commerce between points in various states and in interstate commerce within the State of Pennsylvania.

II. The Pennsylvania Railroad Company is a corporation organized and existing under the laws of the State of Pennsylvania. It is engaged as a common carrier of passengers and freight in interstate commerce between points in various states and in interstate commerce within the State of Pennsylvania.

III. Your petitioners are Appellants and the New York & Pennsylvania Company, a corporation organized and existing under the laws of the State of Pennsylvania, is the Appellee in this action which is a suit instituted by the Appellee under Article 5, Section 5, of the Public Service Company Law of Pennsylvania, to recover a refund

of a portion of the freight charges paid by the Appellee and to enforce [fol. 194] the collection of reparation awarded to the Appellee by the Public Service Commission of Pennsylvania on shipments of coal transported within the State of Pennsylvania during the period from March 1st to September 1st, 1920.

IV. This action was commenced in the Court of Common Pleas of Clinton County, Pennsylvania, by the Appellee, as plaintiff, against the Appellees, your petitioners, as defendants. The Plaintiff's statement of claim filed on or about October 22, 1922, alleged, among other things, that the defendants, your petitioners, were common carriers of coal consigned to the plaintiff and transported over the defendant's lines within the State of Pennsylvania; that there had been shipped to the plaintiff during the period from March 1, 1920, to September 1, 1920, large quantities of coal which were transported by the defendants, your petitioners; that upon such shipments transported between March 1, 1920, and August 25, 1920, both inclusive, the plaintiff paid a rate of $1.10 per ton, and on the shipments transported between August 26, 1920, and September 1, 1920, the plaintiff paid a rate of $1.54 per ton; that upon complaint by the plaintiff the Public Service Commission of Pennsylvania, in a proceeding commonly referred to as Complaint Docket No. 3206, had entered upon a hearing and on August 17, 1921, had made its report wherein it had found that the rates charged on the shipments aforesaid had been unreasonable, with respect to the shipments moving between March 1, 1920 and August 25, 1920, to the extent that they had exceeded $1.00 per ton and with respect to the shipments moving between August 26, 1920, and September 1, 1920, to the extent that they had exceeded $1.40 per ton; that there- [fol. 195] after the plaintiff had filed its petition for reparation for the excess payments; that hearings were held on this petition following which the Public Service Commission of Pennsylvania had made its order dated July 5, 1922, directing the defendants, your petitioners, to pay to the plaintiff the sum of six Thousand One Hundred and Seventy-Two Dollars and Ninety Cents ($6,172.90), with interest, and that the defendants, your petitioners, had failed and refused to pay said order or any part thereof. Copies of the report of the Public Service Commission in so-called Complainant Docket No. 3206 in which it had found the rates charged unreasonable and of its report and order in so-called Reparation Docket No. 4738 in which it had found that the plaintiff was entitled to reparation and made the order directing the defendants, your petitioners, to pay the reparation, were attached and made a part of the statement of claim.

V. Your petitioners duly filed their affidavits of defense to said statement of claim—the affidavits of defense of both your petitioners being substantially to the same effect—and in said affidavits of defense they alleged, among other things, as follows:

"For a separate and complete defense to the Plaintiff's statement of Claim, this defendant avers that the New York Central Railroad

Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10 were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit 'A'. This defendant [fol. 196] alleges that by Section 208(a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission had never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including section 208(a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of the said rate was not in violation of the Pennsylvania Public Service Company Law.

"This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as Exhibit 'G' would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was therefore null and void.

"This defendant alleges that since said order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff had no cause of action under Section 5 of Article 5 of the Public Service Company Law."

VI. Thereupon the plaintiff, the New York & Pennsylvania Company, obtained a rule upon the defendants, your petitioners, to show cause why judgment should not be entered in favor of the plaintiff and against the defendants, your petitioners, for want of a sufficient affidavit of defense.

VII. Upon the motion of the plaintiff, the New York & Pennsylvania Company, the Court of Common Pleas of Clinton County, Pennsylvania, made absolute the rule to show cause and directed that judgment be entered for the plaintiff. Judgment was thereupon entered as follows:

[fol. 197] "And now, July 23, 1923, by the direction of the Court, judgment is entered in favor of the plaintiff and against the defendants, for the sum of Six Thousand Five Hundred Forty-six 44/100 Dollars, as follows:

Principal	$6,172.97
Interest from July 20, 1922 to July 23, 1923	373.46
Real Debt	$6,546.43

Entered July 23, 1923. Judgment, $6,546.43."

VIII. The defendants, your petitioners, duly excepted to the order and at their request a bill was sealed.

IX. Thereupon the defendants, your petitioners, duly appealed from said order and judgment to the Supreme Court of Pennsylvania, Eastern District. Said appeal came on for argument before said Supreme Court of Pennsylvania, Eastern District, and your petitioners, through their counsel, duly argued that said judgment should be reversed and that the suit should be dismissed for the reason that the enforcement of judgment against your petitioners would be in violation of Section 208(a) of the Transportation Act, 1920; that since the Interstate Commerce Commission had not approved a reduction in the rates charged on the Appellee's shipments below the rates in effect on February 29, 1920, the order of the Public Service Commission awarding reparation to the Appellee in the amount of the difference between the rates in effect on February 29, 1920, and charged on the Appellee's shipments, and lower rates which the Public Service Commission of Pennsylvania determined would have been reasonable, was null and void by reason of the provisions of Section 208(a) of the Transportation Act, 1920, and that because of the said provisions of said Act, the Appellees was without any cause of action under the Public Service Company Law of Pennsylvania.

[fol. 198] X. Thereafter and on or about April 21, 1924, the Supreme Court of Pennsylvania entered its order affirming the judgment of the Court of Common Pleas. Subsequently your petitioners, believing that the opinion of the Court was based upon an erroneous understanding of the facts, filed a petition for reargument. Thereupon the Court withdrew its original opinion. On July 8, 1924, the Court filed another opinion affirming the judgment of the Court of Common Pleas of Clinton County. Believing that the Court still erred in its understanding of the facts and in its conclusion of law, your petitioners on August 25, 1924, filed a second petition for reargument. This petition was considered by the Court and on September 29, 1924, the Court entered an order denying the petition, but correcting a clerical error in its opinion.

XI. Said decisions of the Court of Common Pleas of Clinton County and of the Supreme Court of Pennsylvania, and each of them, decided in favor of the validity of a statute of the Common-

wealth of Pennsylvania or authority exercised under said statute, the validity of which was drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and said decisions were in error, to the prejudice of your petitioners, as will more fully appear from the assignment of errors which is filed herewith.

Wherefore, your petitioners pray that a Writ of Error from the Supreme Court of the United States may issue in this case to the Supreme Court of Pennsylvania, Eastern District, for the correction of errors complained of, and that a transcript of record, proceedings, and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Pennsylvania, may be sent to the Supreme Court [fol. 199] of the United States as provided by law and that your petitioners may have such other and further relief in the premises as may be just.

Henry Wolfe Bikle, Broad Street Station, Philadelphia, Pa.; Parker McCollester, 466 Lexington Avenue, New York, N. Y., Attorneys for Petitioners.

[fol. 200] State of New York,
County of New York, ss:

David E. Gelatt, being duly sworn, deposes and says that he is the General Coal Freight Agent of The New York Central Railroad, one of the plaintiffs in error herein, that he has read the foregoing petition and that the facts therein set forth are true to the best of his knowledge, information and belief.

D. E. Gelatt.

Signed and sworn to before me this 16 day of December, 1924. Charles McLernon, Notary. Notary Public, Nassau County. Certificate filed in New York County. N. Y. County Clerk No. 133. N. Y. Register No. 5103. My Commission expires March 30th, 1925.

[File endorsement omitted.]

[fol. 201] In Supreme Court of Pennsylvania

[Title omitted]

Assignment of Errors—Filed Dec. 18, 1924

Now come the New York Central Railroad Company and The Pennsylvania Railroad Company, plaintiffs in error, and make and file this their assignment or errors.

1. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below

erred for the reason that by virtue of Section 208(a) of the Transportation Act, 1920, the plaintiff below was without a cause of action under the Public Service Company Law of Pennsylvania.

2. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below and in affirming the judgment of the Court of Common Pleas of Clinton County on plaintiff's motion for judgment for want of a sufficient affidavit of defense, erred for the reason that the defendants' affidavits of defense stated a complete defense to the complainant's cause of action; namely, that the freight charges collected on the shipments of the plaintiff below were in accordance with the rates in effect on February 29, 1920; that no reduction in those rates as [fol. 202] applied to shipments transported between March 1, 1920, and September 1, 1920, had been approved by the Interstate Commerce Commission as required by Section 208(a) of the Transportation Act, 1920, and that therefore the order for reparation issued by the Public Service Commission of Pennsylvania upon which the suit was predicated was void and unenforcible and the plaintiff below had no cause of action under the Public Service Company Law of Pennsylvania.

3. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the court below erred for the reason that the freight rates collected by the plaintiffs in error on the shipments made by the plaintiff below were lawful under Section 208(a) of the Transportation Act, 1920, and were therefore not in violation of the Public Service Company Law of Pennsylvania, and the plaintiff below had no cause of action under the provisions of that Act.

4. The Supreme Court of Pennsylvania, Eastern District, erred in holding that Section 208(a) of the Transportation Act, 1920, was not a restriction upon the power of the Public Service Commission of Pennsylvania to order a reduction in rates on shipments moving between March 1, 1920, and September 1, 1920.

5. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the order for reparation issued by the Public Service Commission upon which plaintiff's cause of action below was predicated was not a reduction in the rates on shipments moving between March 1, 1920, and September 1, 1920, and void by reason of the provisions of Section 208(a) of the Transportation Act, 1920.

[fol. 203] 6. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the plaintiffs in error were precluded from setting up the defense relied upon by them because of their failure to appeal from the decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206.

By reason whereof, these petitioners and plaintiffs in error pray that the judgment of the Supreme Court of Pennsylvania, Eastern

District, may be reversed and that they may have such other and further relief in the premises as may be just.

Dated at Philadelphia, Pa., this 17th day of December, 1924.

Henry Wolf Bikle, Broad Street Station, Philadelphia, Pa.; Parker McCollester, 466 Lexington Avenue, New York, N. Y., Attorneys for Plaintiffs in Error.

[fol. 204] [File endorsements omitted.]

[fol. 205] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Dec. 18, 1924

On reading of the petition of The New York Central Railroad Company and the Pennsylvania Railroad Company for writ of error and the assignment of errors, and upon due consideration of the record of said cause:

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Pennsylvania, Eastern District, as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioners and plaintiffs in error give security in the sum of One Thousand Dollars, that the said plaintiffs in error shall prosecute said writ of error to effect and, if said plaintiffs in error fail to make their plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

In witness whereof, I have hereunto set my hand this 18 day of December, 1924.

R. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, Eastern District.

[File endorsement omitted.]

[fol. 206] IN SUPREME COURT OF PENNSYLVANIA

WRIT OF ERROR—Filed Dec. 19, 1924

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania, before you or some of you, being the highest court of law

or equity of the said State in which a decision could be had in said suit between New York Central Railroad Company and Pennsylvania Railroad Company, Plaintiffs in Error and New York & Pennsylvania Company, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the [fol. 207] United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said New York Central Railroad Company and Pennsylvania Railroad Company, Plaintiffs-in-Error, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 19th day of December, in the year of our Lord one thousand nine hundred and twenty-four.

George Brodbeck, Clerk of the United States Dist. Court, E. D. of Pennsylvania. (Seal of the District Court of the United States, E. D. Penna.)

Allowed by R. von Moschzisker, Chief Justice of the Supreme Court of *the* Pennsylvania.

[File endorsement omitted.]

[fols. 208 & 209] Citation—In usual form, showing service on T. R. White; filed Dec. 19, 1924; omitted in printing

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[fol. 210] Bond on Writ of Error for $1,000—Approved and filed Dec. 19, 1924; omitted in printing

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[fol. 211] In Supreme Court of Pennsylvania

Praecipe for Transcript of Record—Filed Dec. 19, 1924

Kindly forward and remit to the Supreme Court of the United States the entire record in the case of the New York and Pennsyl-

vania Company, defendant in error, and the New York Central Railroad Company and The Pennsylvania Railroad Company, plaintiffs in error, with respect to which a Writ of Error was allowed by the Chief Justice of the Supreme Court of Pennsylvania on December 18, 1924.

James I. Gowen, Of Counsel for Plaintiff in Error.

[File endorsement omitted.]

[fol. 212] IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE

I, Thomas Robins, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire record in the case of New York & Pennsylvania Company vs. New York Central Railroad Co. and Pennsylvania Railroad Co., at No. 169, January Term, 1924, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Philadelphia, in the said Eastern District of Pennsylvania, this twenty-sixth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

Thomas Robins, Prothonotary. (Seal of the Supreme Court of Pennsylvania.)

[fol. 213] IN SUPREME COURT OF PENNSYLVANIA

JUDGE'S CERTIFICATE TO CLERK

I, Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify that Thomas Robins was, at the time of signing the annexed attestation, and now is, Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 26th day of December, one thousand nine hundred and twenty-four.

Robert von Moschzisker, Chief Justice.

IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE TO JUDGE

I, Thomas Robins, Prothonotary of the Supreme Court of Pennsylvania in and for the Eastern District, do certify that the Honorable Robert von Moschzisker, by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania, to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this twenty-sixth day of December, one thousand nine hundred and twenty-four.

Thomas Robins, Prothonotary. (Seal of the Supreme Court of Pennsylvania.)

Endorsed on cover: File No. 30,756. Pennsylvania Supreme Court. Term No. 791. New York Central Railroad Company and Pennsylvania Railroad Company, plaintiffs in error, vs. New York & Pennsylvania Company. Filed December 27, 1924. File No. 30,756.

STPONED TO MERITS
MAR 2 - 1925

DEC 27 1924
WM. R. STANSBURY
CLERK

No. 230

IN THE

Supreme Court of the United States

October Term, [redacted] 1925

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY,
Petitioners,

vs.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Respondent.

No.

PETITION FOR WRIT OF CERTIORARI

THE PENNSYLVANIA RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,
By

HENRY WOLFE BIKLE,
Broad St. Station,
Philadelphia, Pa.

PARKER McCOLLESTER,
466 Lexington Ave.,
New York, N. Y.
Their Attorneys.

IN THE

Supreme Court of the United States

October Term, 1924

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY, *Petitioners,* vs. THE NEW YORK AND PENNSYLVANIA COMPANY, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The New York Central Railroad Company and The Pennsylvania Railroad Company in support of their petition for a writ of certiorari to be directed to the Supreme Court of the State of Pennsylvania, Eastern District, to review a decree of judgment rendered on the 29th day of September, 1924, which affirmed the judgment of the Court of Common Pleas of Clinton County, Pennsylvania, entered on the 23rd day of July, 1923, respectfully show:

1. That this is an action brought by respondent

under Article 5, Section 5, of the Public Service Company Law of Pennsylvania to recover a refund of a portion of the freight charges paid to your petitioners by the respondent on shipments of coal transported by your petitioners over their lines within the State of Pennsylvania from mines in the Munson and Hawk Run Districts of Pennsylvania consigned to the respondent at Lock Haven, Pennsylvania. The action is based upon an order of the Public Service Commission of Pennsylvania directing your petitioners to pay to the respondent reparation in the sum of Six Thousand One Hundred Seventy-two Dollars and Ninety-seven Cents ($6,172.97), being the difference between the freight charges collected by your petitioners on such shipments consigned to the respondent and transported by petitioners during the period from March 1, 1920, to September 1, 1920, and the charges which would have been collected on the basis of the freight rates which the Public Service Commission of Pennsylvania found would have been reasonable, plus interest. Your petitioners having declined to pay the reparation as ordered by the Public Service Commission of Pennsylvania this suit was brought by the respondent under the provisions of the Public Service Company Law above referred to, to recover the amount of reparation so ordered by the Commission.

2. The action was commenced in the Court of Common Pleas of Clinton County, Pennsylvania, the respondent's statement of claim being filed on October 22nd, 1922, alleging, among other things, that your petitioners were common carriers of coal consigned to the respondent and transported over petitioners' lines within the State of Pennsylvania; that there had been shipped to the respondent during the period from March 1st, 1920, to September 1st, 1920, large quantities of coal which were transported by your petitioners; that upon such shipments transported be-

tween March 1, 1920 and August 25, 1920, both inclusive, the respondent had paid a rate of $1.10 per ton and on the shipments moving between August 26th, 1920, and September 1st, 1920, both inclusive, respondent had paid a rate of $1.54 per ton; that upon complaint by the respondent the Public Service Commission of Pennsylvania in so-called Complaint Docket No. 3206 had entered upon a hearing and on August 16, 1921 had made a report wherein it had found that the rates charged had been unreasonable to the extent that they had exceeded $1.00 per ton on shipments moving between March 1, 1920, and August 25, 1920, and $1.40 per ton on shipments moving between August 26, 1920, and September 1, 1920; that thereafter the respondent had filed its petition for reparation for the excess payments this proceeding being known as Reparation Docket No. 4738; that hearings on this petition were held following which the Public Service Commission of Pennsylvania had made its order dated June 20, 1922, directing your petitioners to pay to the respondent the sum of Six Thousand One Hundred Seventy-two Dollars and Ninety-seven Cents ($6,172.97), with interest, and that your petitioners had failed and refused to pay said order or any part thereof. Copies of the reports of the Public Service Commission in so-called Complaint Docket No. 3206 and Reparation Docket No. 4738 were attached to and made a part of the statement of claim.

3. Your petitioners duly filed their answers to said statement of claim. The answers of both your petitioners were substantially the same and were in part as follows:

> "For a separate and complete defense to the Plaintiff's Statement of Claim, this defendant avers that the New York Central Railroad Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts

to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as *New York & Pennsylvania Company* v. *Director General,* 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit 'A'. This defendant 'alleges that by Section 208(a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including section 208(a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of the said rate was not in violation of the Pennsylvania Public Service Company Law.

"This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as Exhibit 'G' would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms

of Section 208(a) of the Transportation Act, 1920, and was therefore null and void.

"This defendant alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff had no cause of action under Section 5 of Article 5 of the Public Service Company Law."

4. The respondent, the plaintiff below, obtained a rule upon your petitioners to show cause why judgment should not be entered for the plaintiff for want of sufficient affidavits of defense.

The Court of Common Pleas of Clinton County made absolute the rule to show cause and directed that judgment be entered for the plaintiff accordingly.

5. Your petitioners duly excepted to the ruling of the Court of Common Pleas of Clinton County and appealed from the judgment of said court to the Supreme Court of Pennsylvania, Eastern District. Argument was had before the Supreme Court of Pennsylvania, Eastern District, in which your petitioners through their counsel argued that since the Interstate Commerce Commission had not approved a reduction in their rates below those in effect on February 29, 1920, these rates, by virtue of Section 208 (a) of the Transportation Act, 1920, were the lawful rates to be charged on shipments moving from March 1, 1920, to September 1, 1920, any order or decision of the Public Service Commission of Pennsylvania to the contrary notwithstanding, and that the giving of judgment for the respondent pursuant to the reparation order of the Public Service Commission of Pennsylvania would be in violation of the provisions of Section 208(a) of the Transportation Act, 1920, and would deny to your petitioners their rights thereunder.

6. The Supreme Court of Pennsylvania, Eastern Dis-

trict, notwithstanding the argument of your petitioners, on or about April 21, 1924 entered an order affirming the judgment of the court below in favor of the respondent. Thereupon your petitioners, believing that this decision of the Supreme Court of Pennsylvania, Eastern District, was based upon an erroneous understanding of the facts, petitioned said court for a re-argument. The court withdrew its original opinion, but later, on July 8, 1924, filed another opinion affirming the judgment of the court below. Believing that the court still erred in its understanding of the facts and in its conclusions of the law, your petitioners filed a further petition for re-argument. This petition was considered by the court and on September 29, 1924, the court entered an order correcting an error in its opinion but denying the petition for re-argument and affirming the judgment of the court below.

7. Your petitioners believe and aver that the effect of the decisions and orders of the Supreme Court of Pennsylvania and of the Court of Common Pleas of Clinton County, Pennsylvania, is to deny to your petitioners a right, privilege or immunity claimed by them under Section 208 (a) of the Transportation Act, 1920, and that said decisions are therefore in error.

8. More particularly your petitioners believe and aver that since (a) the freight charges which were collected on the respondent's shipments transported by your petitioners between March 1, 1920 and September 1, 1920, were computed on the basis of the freight rates in effect on February 29, 1920; since (b) Section 208 (a) of the Transportation Act, 1920, provided that the freight rates in effect on February 29, 1920 should remain in effect until thereafter changed by State or Federal authority and pursuant to authority of law, and that prior to September 1, 1920, no such rates should be reduced without the approval of the Interstate Commerce Commission, and

since (c) no reduction in the freight rates applied to respondent's shipments moving between March 1, 1920 and September 1, 1920, below those on the basis of which the freight charges were computed had or has been approved by the Interstate Commerce Commission, *therefore* the freight charges collected were the lawful charges under Section 208 (a) of the Transportation Act, 1920, and the decision of the Supreme Court, of Pennsylvania, Eastern District, affirming a judgment for the respondent in the amount of the difference between the freight charges so collected and freight charges on the basis of lower rates than were in effect on February 29, 1920, denied to your petitioners the right provided by said Act to collect freight charges on shipments moving between March 1, 1920 and September 1, 1920, on the basis of the freight rates in effect on February 29, 1920, unless a reduction in such rates should have been approved by the Interstate Commerce Commission.

9. Your petitioners further believe and aver that since the rates collected on the respondent's shipments were lawful rates under the provisions of Section 208 (a) of the Transportation Act, 1920, they were not unlawful by reason of any provision of the Public Service Company Law of Pennsylvania and the decision of the Supreme Court of Pennsylvania, Eastern District, amounts to a denial to your petitioners of immunity claimed by them under Section 208 (a) of the Transportation Act from liability for an action for damages for an alleged violation of the Pennsylvania Public Service Company Law.

10. As stated in the next to the last paragraph of its opinion the Supreme Court of Pennsylvania, Eastern District, holds that after March 1, 1920, the Federal Government had no authority with respect to intra-state transportation, except to prevent discrimination against interstate commerce.

This amounts to a decision that in the absence of discrimination against interstate commerce the provisions of the Transportation Act, 1920, and particularly of Section 208 (a) thereof had no application to the rates of your petitioners for transportation within the State of Pennsylvania during the period from March 1, 1920, to September 1, 1920, and is therefore a denial of the controlling effect of said Act claimed by your petitioners and is, as your petitioners believe and aver, in error.

11. In the last paragraph of its opinion, the Supreme Court of Pennsylvania, Eastern District, holds that the order for reparation of the Public Service Commission of Pennsylvania upon which this action was based was not an attempt to reduce rates but to correct charges. Said court therefore appears to conclude that a judgment enforcing the reparation order would not be in violation of the provisions of Section 208 (a) of the Transportation Act, 1920.

Since the reparation order of the Public Service Commission of Pennsylvania would require your petitioners to pay to the respondent the difference between the charges collected on respondent's shipments, which were on the basis of the rates that were in effect on February 29, 1920, and lower rates which the Public Service Commission of Pennsylvania determined would have been reasonable, your petitioners believe and aver that the court below erred and that satisfaction of a judgment for the respondent in a suit to enforce this order would accomplish a reduction in rates below those in effect on February 29, 1920, and in view of the fact that the approval of the Interstate Commerce Commission of such a reduction has not been secured would be contrary to the provisions of said Act.

12. The opinion of the Supreme Court of Pennsylvania, Eastern District, suggests also that said court was

of the view that by their failure to appeal to the courts from the decision of the Public Service Commission of Pennsylvania in so-called Complaint Docket No. 3206, in which said Commission in its report announced its opinion that a reasonable rate to have charged on respondent's shipments would have been $1.00 per ton instead of $1.10 per ton which was the rate in effect on February 29, 1920, your petitioners were precluded from setting up as a defense to the respondent's claim the lack of the Interstate Commerce Commission's approval of a reduction in the rates charged on the respondent's shipments below the rates in effect on February 29, 1920.

As the basis for this conclusion the Supreme Court of Pennsylvania, Eastern District, appears to hold that the same issues were raised in Complaint Docket No. 3206 before the Public Service Commission of Pennsylvania and were decided by the Commission as were raised by your petitioners' affidavits of defense and that having failed to appeal to the courts from this decision your petitioners, under the provisions of the Public Service Company Law of Pennsylvania, were precluded from raising these issues in defense to an action to enforce an order for reparation issued by the Commission in a subsequent proceeding before it.

Your petitioners believe that in so holding the Supreme Court of Pennsylvania, Eastern District, erred for the following reasons among others:

FIRST: The report of the Public Service Commission of Pennsylvania in said Complaint Docket No. 3206, indicates that the Commission did not pass upon these issues and did not decide that it had the power to order a reduction in freight rates on shipments transported between March 1, 1920 and September 1, 1920, without the approval of the Interstate Commerce Commission, and that it did not decide that an order for reparation on

such shipments might be enforced without such approval regardless of Section 208(a) of the Transportation Act, 1920.

SECOND: Such a decision was not necessary to the determination of other issues before the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 and would have been premature for the reason that in this proceeding the Public Service Commission made no order for reparation, expressly reserving the question of issuing such an order until a later proceeding. The approval of the Interstate Commerce Commission might have been obtained thereafter and before an order for reparation was applied for or issued and, for all that was known at the time the Commission's report in Complaint Docket No. 3206 was issued, the respondent might never have applied to it for an order for reparation.

Had the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 made an order for reparation your petitioners would have been precluded from taking an appeal to the courts by Article VI, Section 17, of the Public Service Company Law of Pennsylvania which provides, "That there shall be no appeal from any order for reparation made by the Commission, but the suit may be brought as hereinbefore provided"—and as was done here.

THIRD: The Public Service Commission of Pennsylvania, exercising its powers only by virtue of the Public Service Company Law of Pennsylvania, was neither empowered nor qualified to determine the issues raised by the affidavits of defense which are issues arising because of a Federal statute.

FOURTH: Your petitioners asserted their defense under Section 208(a) of the Transportation Act, 1920, at the earliest opportunity when such defense could be asserted by them in a court proceeding, namely, in their

affidavits of defense to the respondent's statement of claim in the lower Court.

Your petitioners therefore believe that this Court should review the record and that upon such review should conclude that the Supreme Court of Pennsylvania, Eastern District, erred in deciding that the failure of your petitioners to appeal from the opinion of the Public Service Commission in Complaint Docket No. 3206 deprived them of the defense to the respondent's cause of action asserted by them under Section 208(a) of the Transportation Act, 1920, and should conclude that such defense was seasonably claimed.

WHEREFORE your petitioners pray that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Pennsylvania, Eastern District, commanding that court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act, and your petitioners will ever pray.

THE PENNSYLVANIA RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,

By

HENRY WOLFE BIKLE,
Broad St. Station,
Philadelphia, Pa.

PARKER McCOLLESTER,
466 Lexington Ave.,
New York, N. Y.
Their Attorneys.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

PARKER MCCOLLESTER, being duly sworn, deposes and says that he is counsel for the above named petitioners, that he prepared the foregoing petition and that the allegations thereof are true to the best of his knowledge and belief.

PARKER McCOLLESTER.

Sworn to and subscribed before me this 23rd day of December, 1924.

C. A. HALPIN,
Notary Public, Westchester County. Certificate filed in New York County. N. Y. Co. Clerk No. 888; N. Y. Register No. 6150a. My Commission expires March 30th, 1926.

FILED
MAR 21 19
WM. R. STAN

IN THE

Supreme Court of the United States

[No. 230

OCTOBER TERM, 1925

THE NEW YORK CENTRAL RAILROAD COMPANY

and

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

Error to The Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR

HENRY WOLF BIKLE,
FREDERIC D. MCKENNEY,
PARKER MCCOLLESTER,
Attorneys for Plaintiffs-in-Error.

Table of Contents

PAGE

Statement 1

Contentions of Plaintiffs-in-Error..... 3

History of the Case..... 5

Argument 12

I. The Writ of Error was properly allowed since there was drawn in question the validity of a statute or an authority exercised under the State of Pennsylvania on the ground of its being repugnant to Section 208 (a) of the Transportation Act, 1920, and the decision of the Supreme Court of Pennsylvania was in favor of their validity 12

(a) This suit was brought under the provisions of the Public Service Company Law of Pennsylvania and to enforce an order of the Public Service Commission of that State 12

(b) The Validity of the Order of the Public Service Commission is drawn in Question on the Ground of its being repugnant to Section 208 (a) of the Transportation Act, 1920 13

(c) The Order of the Public Service Commission was a Statute of or Authority exercised under a State within the Meaning of Section 237 of the Judicial Code..... 14

(d) The Validity of the Public Service Company of Pennsylvania is drawn in Question on the Ground that it is in conflict with Section 208 (a) of the Transportation Act, 1920..... 16

PAGE

II. The contention that the decision of the Supreme Court of Pennsylvania was based in part upon the ground that the Plaintiffs-in-Error were concluded from setting up their defense under Section 208 (a) of the Transportation Act, 1920, by their failure to appeal from the decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 does not afford a ground for dismissing the Writ of Error 18

(a) This Contention goes to the question whether the Reparation Order of the Public Service Commission was Valid and not whether its Validity is here drawn in Question 18

(b) The Circumstances of this Case are such that this Court should itself review the Record to ascertain whether the Federal Question sought to be put in issue was waived by the failure of the Plaintiffs-in-Error to appeal from the first decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 19

(c) The Federal Question goes to the entire Case, including the effect of the Failure to appeal from the decision of the Public Service Commission in Complaint Docket No. 3206 24

Conclusion 26

List of Citations

	PAGE
Corn Products Refining Co. v. Eddy, 249 U. S. 427.	25
Erie v. Purdy, 185 U. S. 152	19
Harding v. Illinois, 196 U. S. 78	25
Lake Erie & Western R. R. v. Public Utilities Comn., 249 U. S. 422	14
Lehigh & New England v. Public Service Comm., 277 Pa. 493	22
Lehigh & New England v. Public Service Comm., 79 Pa. Sup. Ct. 540	22
Mutual Life Insurance Co. v. McGrew, 188 U. S. 291	19
N. Y. C. R. R. Co. v. Public Service Comm., 268 Fed. 558	15
New York & Pennsylvania Co. v. N. Y. C. R. R. Co., 126 Atl. 382	11
New York & Pennsylvania Co. v. Director General, 58 I. C. C. 124	6
Nor. Car. R. R. v. Zachary, 232 U. S. 248	25
Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135	16
Pennsylvania R. R. v. Public Service Comm., 250 U. S. 566	14
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362	15
Southern Pacific Co. v. R. R. Comm., 231 Pac. 28	14
Union Pacific R. R. v. Public Service Comm., 248 U. S. 67	20
West Chicago R. R. v. Chicago, 201 U. S. 506	25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924. No. 791.

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR

STATEMENT

This is an action under the Public Service Company Law of Pennsylvania (Laws 1913, p. 1374; 1915, p. 779; 1917, p. 808) to enforce an order of the Public Service Commission of that State directing the plaintiffs-in-error to refund by way of reparation to the defendant-in-error the difference between freight charges paid by the defendant-in-error on shipments moving between March 1 and September 1, 1920, the so-called Guar-

anty Period during which the Federal Government guaranteed the revenues of the railroads which had been under Federal control, and rates which the State Commission found would have been reasonable.

The charges collected were based upon the freight rates lawfully in effect on February 29, 1920, and no reduction of these rates had or has been approved by the Interstate Commerce Commission. Under these circumstances the plaintiffs-in-error have denied the right of the defendant-in-error to recover and have asserted that the charges collected were lawful because of the provision of Section 208(a) of the Transportation Act, 1920 (41 Stat. L. 464), which is as follows:

> "SEC. 208 (a). All rates, fares and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the [Interstate Commerce] Commission."

The highest court in Pennsylvania having affirmed a judgment for the defendant-in-error, the Writ of Error from this court, the dismissal of which is here prayed for, was sought and allowed.

CONTENTIONS OF PLAINTIFFS-IN-ERROR

In answer to the contentions of the defendant-in-error it is submitted that under Section 237 of the Judicial Code, as amended (36 Stat. L. 1156, 38 Stat. L. 790, 39 Stat. L. 726, 42 Stat. L. 366), the Writ of Error was properly allowed and that the motion to dismiss should be denied for the following reasons:

1. There is drawn in question the validity of a statute of, or an authority exercised under the State of Pennsylvania on the ground of its being repugnant to the laws of the United States in that:

(a) The suit of the plaintiff below, the defendant-in-error here, is brought solely under the provisions of the Public Service Company Law of Pennsylvania to enforce an order of the Pennsylvania Public Service Commission for the payment of reparation.

(b) The validity of this order of the Public Service Commission of Pennsylvania is drawn in question on the ground that it is repugnant to Section 208(a) of the Transportation Act, 1920—such order being a statute of or an authority exercised under the State of Pennsylvania within the meaning of Section 237 of the Judicial Code.

(c) There is drawn in question the validity of the provisions of the Public Service Company Law of Pennsylvania as construed by the Supreme Court of Pennsylvania on the ground that said provisions are in conflict with Section 208(a) of the Transportation Act, 1920.

2. The contention that the Writ of Error should be dismissed because the decision of the Supreme Court of Pennsylvania was based in part upon the ground that

plaintiffs-in-error were concluded as to the points they sought to raise by their failure to appeal from a former decision of the Public Service Commission of Pennsylvania should not prevail since:

(a) This contention goes to the question whether the reparation order of the Public Service Commission was valid and not whether its validity is here drawn in question.

(b) If this part of the decision of the Supreme Court of Pennsylvania be construed as a decision that the Federal question was not properly raised, the facts in this case are such that this Court, rather than dismissing the Writ of Error, should itself review the record to ascertain whether the failure to appeal from the decision of the Public Service Commission in a proceeding prior to that in which the order here sued upon was made, constituted a waiver of the Federal question sought to be brought in issue in this case.

(c) This portion of the opinion of the Supreme Court of Pennsylvania is based solely upon a construction of the provisions of the Public Service Company Law of that State to the effect that under that Statute the rates charged on the shipments made by the defendant-in-error were unlawful because declared unreasonable by the Public Service Commission and because the plaintiffs-in-error did not appeal from that decision. Therefore the denial that under these facts the Public Service Company Law gave to the defendant-in-error a cause of action to enforce the reparation order and the assertion that the rates were lawful under Section 208(a) of the Transportation Act, 1920, brings in question the controlling effect of the Public Service Company Law as construed by the Supreme Court of Pennsylvania on the ground of its repugnance to Section 208(a) of the Transportation Act, 1920.

HISTORY OF THE CASE

The plaintiffs-in-error, The New York Central Railroad Company and The Pennsylvania Railroad Company, operate a through route for the transportation of coal by railroad from certain mines in Pennsylvania to Lock Haven, in the same State—the New York Central hauling the coal from the mines to Bald Eagle Junction and the Pennsylvania hauling the coal from Bald Eagle Junction to Lock Haven. This transportation was entirely within the boundaries of the State. The defendant-in-error regularly receives shipments of coal forwarded from the mines consigned to it at Lock Haven.

The lines of the plaintiffs-in-error were operated by the President through the Director-General of Railroads during the so-called period of Federal control. The Director-General, acting under the power conferred upon him by Section 10 of the Federal Control Act (40 Stat. L. 451), on or about July 1, 1919, as a part of the general increase in freight rates directed by his General Order No. 28, established a through rate of $1.10 per ton for the transportation of coal from the mines to Lock Haven—this through rate being made up of a rate of 70 cents per ton for transportation over the line of the New York Central Railroad from the mines to Bald Eagle Junction, and a rate of 40 cents per ton for transportation from Bald Eagle Junction to Lock Haven via the Pennsylvania Railroad.

The defendant-in-error filed a complaint with the Interstate Commerce Commission alleging that this through rate of $1.10 was an unreasonable rate, claiming, as was the fact, that the increase directed by General Order No. 28 in the portion of the charge for the haul over the line of the New York Central had been based upon a rate which the Public Service

Commission of Pennsylvania prior to Federal Control had held to be unreasonable.

The Interstate Commerce Commission in its report, *New York & Pennsylvania Co.* v. *Director General*, 58 I. C. C. 124 (Record pp. 27-31), held that it was immaterial how the through rate of $1.10 had been constructed and that the only question to be determined was as to the justness and reasonableness of this rate, the manner in which the rate was arrived at being "only one of elements to be considered in determining the issue" (Record p. 31). This Commission also held "that the rates attacked were not unreasonable or otherwise unlawful as alleged," and ordered the dismissal of the complaint (Record p. 32).

The through rate of $1.10 remained in effect from July 1, 1919, during the balance of the period of Federal control and was in effect on February 29, 1920, and lawfully so, as the Interstate Commerce Commission held in the aforesaid decision.

Shortly prior to the termination of Federal control the defendant-in-error filed a complaint with the Public Service Commission of Pennsylvania, referred to in the record herein as Complaint Docket No. 3206, in which it alleged that the through rate of $1.10 would be unlawful in violation of the Public Service Company Law of Pennsylvania after the termination of Federal control. Hearing was held upon this complaint, but the decision of the Public Service Commission was not announced until August 17, 1921, more than a year after Federal control had ended.

In its report (Record pp. 7-12) the Public Service Commission announced the conclusion that the just and reasonable through rate from the mines to Lock Haven, Pa., for the period from March 1, 1920, to August 25,

1920, both inclusive, would have been $1.00 per ton (Record p. 11), and effective August 26, 1920, $1.40 per ton (Record p. 12).

At the time it announced this decision the Public Service Commission made an order, dated August 16, 1921, directing the plaintiffs-in-error to establish within fifteen days thereafter a through rate of $1.40 per ton to be applied in the future. It issued no order, however, directing the plaintiffs-in-error to make any adjustment of their freight charges or to refund any portion thereof by way of reparation with respect to shipments which had moved during the period prior to the date of the report, but said "upon the presentation of a petition accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined" (Record p. 12).

The plaintiffs-in-error did not seek to oppose the Public Service Commission's order with respect to rates for the future nor to attack its conclusions as contrary to the evidence. Neither did they contest the jurisdiction of this Commission to consider and pass upon the reasonableness of their rates for the entire period subsequent to the termination of Federal control. They had contended before the Commission that pursuant to Section 208(a) of the Transportation Act, 1920, the rate of $1.10 which was in effect on February 29, 1920, remained the lawful rate until thereafter changed by the State authorities and that therefore the burden of proof was upon the defendant-in-error to show that the rate was unreasonable (Record p. 10). It was also their position that the authority of the State Commission to declare the rates unreasonable subsequent to Federal control was qualified by the proviso of Section 208(a) of the Transportation Act, 1920, that no rate should be reduced prior to September 1, 1920, without the approval of the Inter-

state Commerce Commission and they believed that this proviso would prevent the enforcement of any order made by the Public Service Commission of Pennsylvania as to the shipments moving prior to September 1, 1920, which sought to give effect to a rate lower than the rate which was in effect on February 29, 1920, unless, before such order was made or suit brought for its enforcement, the approval of the Interstate Commerce Commission of the reduction had been obtained (Record, p. 80).

However, since the Public Service Commission in Complaint Docket No. 3206 issued no order with respect to shipments moving during the so-called Guaranty Period; since the objection which the plaintiffs-in-error would have had to such an order did not run to the only order which the Commission did make prescribing rates for the future; since the Public Service Commission had plainly announced that it would entertain a *further* proceeding upon the reparation issue and since finally it was not impossible that before the issuance of an order affecting shipments during the Guaranty Period or a suit for the enforcement of such order the approval of the Interstate Commerce Commission to a reduction in rates might be obtained, the plaintiffs-in-error conceived that an appeal to the courts at that time would not properly raise the question of the validity of such an order with respect to the Guaranty period and would be wholly inappropriate. They were confirmed in this view by the fact that as the Guaranty period had long since passed such an order would have to be in the form of a reparation order and by the further fact that Article VI, Section 17, of the Public Service Company Law of Pennsylvania, which provides for appeals to the Superior Court of the State from findings or determinations of the Commission, contains the proviso that "there shall be no appeal from any order for reparation made by the Commission, but the suit may be brought as hereinbefore

provided"—the suit referred to being a suit for recovery of reparation in which the reparation order of the Commission shall be *prima facie* evidence as provided in Article V, Section 5, of the same Act.

Thereafter the defendant-in-error filed a new complaint or petition with the Public Service Commission for the recovery of reparation on past shipments, this complaint being referred to in the record as Complaint Docket No. 4738. In this proceeding although the plaintiffs-in-error contended that as to the shipments moving during the Guaranty Period a valid reparation order could not be issued since the Interstate Commerce Commission had not approved a reduction in the rates for this period below the $1.10 rate in effect on February 29, 1920, the Public Service Commission issued its report holding that the defendant-in-error was entitled to reparation (Record pp. 15-18).

In order that the question of the effect of Section 208(a) of the Transportation Act, 1920, upon the claim for refund of charges on shipments during the Guaranty Period might conveniently be litigated, the State Commission at the request of the parties made two separate orders, one relating only to the shipments during the Guaranty Period and the other relating to the shipments transported thereafter. By both orders the plaintiffs-in-error were directed to pay to defendant-in-error the amounts by which the charges collected based on the $1.10 rate, found reasonable by the Interstate Commerce Commission, exceeded the charges which would have accrued on the basis of the lower rates found reasonable by the State Commission (Record pp. 19, 20).

The plaintiffs-in-error not denying the validity of the second order paid the reparation in the amount ordered. They believed, however, that the first order was invalid by reason of Section 208(a) of the Transportation Act,

1920, as was the Public Service Company Law if construed to give a cause of action for its enforcement, and therefore declined to comply with the first reparation order.

Thereupon the defendant-in-error instituted this suit in the Court of Common Pleas of Clinton County, Pennsylvania, to recover the amount of the reparation ordered by the Public Service Commission in its Order No. 1 and to enforce compliance with said order (Record pp. 1-21). The plaintiffs-in-error duly filed their affidavits of defense (Record pp. 22-36) alleging, among other things, as follows:

> 14. For a separate and complete defense to the plaintiff's Statement of Claim, this defendant avers that the New York Central Railroad Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as *New York & Pennsylvania Company* v. *Director General,* 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit "A"; this defendant alleges that by Section 208 (a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission

has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including Section 208 (a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law.

15. This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, and attached to plaintiff's statement of Claim as "Exhibit G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was, therefore, null and void.

16. This defendant alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff has no cause of action under Section 5 of Article 5 of the Public Service Company Law."

Defendant-in-error obtained a rule for judgment for want of sufficient affidavits of defense on the grounds (1) that since no appeal had been taken from the State Commission's decision in Complaint Docket No. 3206, that decision was conclusive as to the issues raised; (2) that the Transportation Act did not render the Interstate Commerce Commission's approval of the State Commission's order necessary, and (3) that the rates in question were subject to the exclusive authority of the State (Record pp. 36, 37).

The Trial Court made the rule absolute and gave

judgment for the defendant-in-error, which judgment was affirmed by the Supreme Court of the State (Record pp. 89-95. *New York & Pennsylvania Co.* v. *New York Central R. R. Co.*, 126 Atl. 382). A petition for reargu-ments was denied on September 29, 1924. It is this de-termination, review of which is sought here.

ARGUMENT

I.

The Writ of Error was properly allowed since there was drawn in question the validity of a statute or an authority exercised under the State of Pennsylvania on the ground of its being repugnant to Section 208 (a) of the Transportation Act, 1920, and the decision of the Supreme Court of Pennsylvania was in favor of their validity.

(a) This suit was brought under the provisions of the Public Service Company Law of Pennsylvania and to enforce an order of the Public Service Commission of that State.

This suit was brought solely under Article V, Section 5, of the Public Service Company Law of Pennsylvania, which is, in part, as follows:

> "If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named therein to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be *prima facie* evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received."

The reparation order of the Public Service Commission of Pennsylvania was alleged in the statement of claim of the plaintiff below, the defendant-in-error here, as the basis of its suit. If it is the basis of a suit and *prima facie* evidence therein it is because it is made so by the portion of the State statute above quoted. The right of the defendant-in-error to recover, therefore, depends upon the validity of the order and upon the validity of the Public Service Company Law making that order *prima facie* evidence and giving to the defendant-in-error a cause of action for its enforcement. The State court having held that the defendant-in-error is entitled to recover has decided in favor of the validity of the order and of this statute if their validity is drawn in question.

(b) The Validity of the Order of the Public Service Commission is drawn in Question on the Ground of its being repugnant to Section 208 (a) of the Transportation Act, 1920.

In their affidavits-of-defense to the statement of claim of the plaintiff below, the defendant-in-error here, the plaintiffs-in-error denied the validity of the order of the Public Service Commission of June 20, 1922, in Complaint Docket No. 4738 upon which this suit is based (Record pp. 25, 26, 36). This contention proceeded upon the grounds (1) that the rate charged was a lawful rate under the provisions of Section 208(a) of the Transportation Act, 1920, and therefore was not unlawful in violation of the Public Service Company Law; (2) that therefore the order of the Public Service Commission based upon the theory that the rate was unlawful in violation of the Public Service Company Law was void, and (3) that the order would accomplish a reduction in the rates for the Guaranty Period below the level of the rates in effect at the termination of Federal control, without the approval of the Interstate Commerce Commission as required by Section 208(a) of the Transportation Act, 1920 (Record pp. 22-36).

(c) The Order of the Public Service Commission was a Statute of or Authority exercised under a State within the Meaning of Section 237 of the Judicial Code.

This court has held that a decision of a State court sustaining as valid an order of a State administrative tribunal may be reviewed on Writ of Error. *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission,* 249 U. S. 422; *Pennsylvania R. R. Co.* v. *Public Service Commission,* 250 U. S. 566.

It may be urged that there is a distinction between orders of an administrative tribunal looking to the future as did those considered in the two cases cited and an order for reparation such as is here involved. On this theory the Supreme Court of California has recently sustained a reparation order of the Railroad Commission of that State relating to shipments moving during the Guaranty Period the validity of which was attacked upon apparently the same grounds as is the validity of the order of the Pennsylvania Public Service Commission here in issue. *Southern Pacific Co.* v. *Railroad Commission,* 231 Pac. 28. We believe that this decision is clearly erroneous and that the theory of the court proceeds from a mistaken application of language in cases where different issues were presented.

We submit, however, that whatever may be the character of a reparation order in other circumstances, nevertheless, when the effect of the reparation order here in question is considered in the light of the obvious purpose of the Congress in passing Section 208(a) of the Transportation Act, 1920, it must be held that the reparation order and the determination of the Public Service Commission upon which it was based constituted a legislative rather than a judicial act, whose validity may as properly be reviewed on Writ of Error as the validity of an order fixing rates for the future.

It is, we believe, unquestioned that Section 208(a) of the Transportation Act, 1920, was passed to protect the Federal government in its guaranty of the revenues of the carriers during the period of six months following the termination of Federal control from an undue burden resulting from efforts to reduce their rates below the levels which were in effect at the time Federal control ended. *New York Central R. R. Co.* v. *Public Service Commission,* 268 Fed. 558, 560.

The defendant-in-error filed its complaint, Docket No. 3206, with the Public Service Commission of Pennsylvania shortly prior to the termination of Federal control and sought an order of that Commission requiring the railroads to reduce their rates when Federal control should have ceased. It is clear that if the State Commission had concluded its proceeding and made its determination in March, 1920, and had then issued an order directing the railroads to establish the rate of $1.00 for the period from March 1st to September 1st, 1920, the order would have been invalid unless approved by the Interstate Commerce Commission or unless the Transportation Act, 1920, had no application to intrastate rates. Being an order fixing rates for the future it would have been legislative in character and a decision sustaining its validity would have been reviewable on Writ of Error. *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362. We submit that the mere fact that the Public Service Commission did not complete its consideration and issue its order until after the Guaranty Period had ended does not change the essential character of its action and that while its order may of necessity be in the form of a reparation order, it is, nevertheless, in substance an order directing the retroactive establishment of a rate and therefore is in reality legislative or administrative. It is certainly clear that the purpose of the Congress in adopting Section

208(a) of the Transportation Act, 1920, to protect the revenues of the carriers would be defeated quite as effectively by such an order as by a prospective order fixing a reduced rate for the Guaranty Period.

(d) The Validity of the Public Service Company Law of Pennsylvania is drawn in Question on the Ground that it is in conflict with Section 208 (a) of the Transportation Act, 1920.

The defendant-in-error has no cause of action unless the rates charged on its shipments were unlawful in violation of the Public Service Company Law of Pennsylvania. The State Commission found that the rates were in violation of the State statute and made the order here sued on predicated upon such finding. The State Court has declared that the order is valid and that the Public Service Company Law gives the defendant-in-error a cause of action for its enforcement.

The plaintiffs-in-error on the other hand assert that so far as the shipments involved in this suit are concerned, the Public Service Company Law was superseded by the Transportation Act, 1920; that the rates charged were lawful under that Act, and that therefore the defendant-in-error is without a cause of action under the Public Service Company Law to enforce the order of the State Commission.

In *Northern Pacific Railway Co.* v. *North Dakota*, 250 U. S. 135, this Court, on Writ of Error, reviewed and reversed a decision of a State court sustaining the allowance of a writ of mandamus requiring a railroad to charge no higher rates than those fixed by State law. The Writ of Error was sought on the ground that the State law was inapplicable, having been superseded by the Federal Control Act and the rates objected to having been established pursuant to that act. In the case at bar the rates charged were likewise established pursuant to the Federal Control Act. The Transportation Act,

1920, whose provisions are relied upon, was an act relating to the return of the railroads to their owners, as the Federal Control Act provided for their taking over by the government. The situation presented in the case at bar is in all respects similar to that considered in the *North Dakota case* and it is submitted that if a Writ of Error was proper there it is equally so here.

Whichever of the reasons suggested in the opinion of the Pennsylvania Supreme Court determined its decision, we submit that this conclusion is required.

The State Court says that in the absence of discrimination against interstate commerce the provisions of the Public Service Company Law were applicable with full force and effect to intrastate rates after the termination of Federal control (Record pp. 74, 75). We contend that the rates charged were lawful under Section 208(a) of the Transportation Act, 1920, that the provisions of that Act were controlling and therefore that the rates were not unlawful under the Public Service Company Law.

Again the defendant-in-error contends that the State court has decided that the order of the Public Service Commission did not constitute a reduction of the rate. It is true as we concede that if this be so the order was not invalid under Section 208(a) of the Transportation Act, 1920, and the provisions of the Public Service Company Law were controlling, but we cannot see on what theory the enforcement of the order would not be considered a reduction since it would give effect to a rate which was lower than the rate which was in effect on February 29, 1920. This question, however, is one which arises in considering the merits of the case and not in considering whether the validity of a State statute or authority has been drawn in question.

The opinion of the State court suggests as another ground of its decision the failure of the plaintiffs-in-error

to appeal from the decision of the Public Service Commission in Complaint Docket No. 3206. But to the extent that this is held by the court to require judgment for the defendant-in-error, it must be because the court construes the provisions of the Public Service Company Law as rendering the determination of the State Commission conclusive if unappealed from and creating a right to reparation in a subsequent proceeding. If this is a proper construction of the Public Service Company Law, then it is submitted that its validity is clearly brought in issue by the contention of the plaintiffs-in-error that, notwithstanding the failure to appeal, a judgment for the defendant-in-error would be in violation of Section 208(a) of the Transportation Act, 1920.

We, therefore, submit that the validity of a State statute is here drawn in question within the meaning of Section 237 of the Judicial Code and that the Writ of Error was properly allowed.

II.

The contention that the decision of the Supreme Court of Pennsylvania was based in part upon the ground that the plaintiffs-in-error were concluded from setting up their defense under Section 208 (a) of the Transportation Act, 1920, by their failure to appeal from the decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206 does not afford a ground for dismissing the Writ of Error.

(a) This Contention goes to the question whether the Reparation Order of the Public Service Commission was Valid and not whether its Validity is here drawn in Question.

We conceive that on the motion to dismiss the Writ of Error the question before the court is not whether the State statute or order was invalid, a question which goes to the merits of the case, but whether their validity has been drawn in question.

Insofar as the opinion of the State Court suggests as a reason for its decision the failure to take an appeal from the decision of the Public Service Commission in Complaint Docket No. 3206, it does so upon the ground that the provisions of the Public Service Company Law made the reparation order of the Commission, upon which suit is brought and which in turn was predicated upon the earlier decision of the Commission, valid and incontestable insofar as any objection under the Transportation Act, 1920, is concerned. The affidavits of defense, on the other hand, by asserting that the rates were lawful under the Transportation Act, 1920, regardless of the provisions of the State law, directly put in issue not only the validity of the State Commission's order, but the controlling effect of that part of the Public Service Company Law which, as construed by the State Court, would make that order incontestable because of the failure to appeal in Complaint Docket No. 3206, and would give a cause of action thereon.

(b) The Circumstances of this Case are such that this Court should itself review the Record to ascertain whether the Federal Question sought to be put in issue was waived by the failure of the plaintiffs-in-error to appeal from the first Decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206.

In *Erie* v. *Purdy*, 185 U. S. 152, this court said:

> "The question whether a right or privilege claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court is itself a Federal question in the decision of which this court on writ of error is not concluded by the view taken by the highest court of the State."

It has been held that the proper time and manner to raise a Federal question is upon the pleadings in the trial court. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291.

The objection to the validity of the reparation order of the Public Service Commission and of the Public Service Company Law in giving a cause of action on such order was raised at the earliest possible moment that the order was made the subject of litigation, namely, in the affidavits of defense to the statement of claim. Under the Public Service Company Law this was the first opportunity which the plaintiffs-in-error had to object to the reparation order itself—the Public Service Company Law expressly prohibiting an appeal from a reparation order and providing for objection thereto only in a suit brought for its enforcement.

The decision of the Pennsylvania Supreme Court is not that the Federal question was raised in an untimely manner in this suit, but that it should have been raised by an appeal from a decision of the Public Service Commission in an earlier case than that in which the order here in suit was made. We know of no decisions of this court which have gone so far as to hold that a Federal question has not been properly raised under these circumstances.

Our opponents urge that the decision of the State Court that under the State law the defense here relied upon was waived by the failure to appeal from the Commission's decision in Complaint Docket No. 3206 is binding upon this Court. This court, however, has held that in spite of a decision of a State Court it will examine for itself to ascertain whether there is any basis for a finding that an objection to a State action on Federal grounds has been waived. *Union Pacific R. R.* v. *Public Service Commission,* 248 U. S. 67. It is submitted that the circumstances of the present case are such as to bring it within this principle. We believe that this Court should certainly review the record when it appears that the objections to the validity of the statute and the reparation order raised by the affidavits of defense did not exist at

the time of the decision in Docket No. 3206, could not have been made the subject of an appeal from that decision and therefore could not have been waived by the failure to take an appeal therefrom.

The decision of the Public Service Commission in Complaint Docket No. 3206 speaks for itself (Record pp. 7-12). We submit that there is nothing in the language of the Commission to indicate that it was the intention of the Commission to hold that an order for reparation which it might issue in a subsequent proceeding might thereafter be enforced without the approval of the Interstate Commerce Commission. The Public Service Commission merely announced that it would entertain a petition for an award of reparation. What might thereafter happen was a matter of speculation only. In spite of the Commission's invitation the defendant-in-error might not have sought reparation, or it might have failed to prove the payment of the freight charges or, before the State Commission was asked to make its reparation order, the Interstate Commerce Commission might have given its approval to a reduction in the rates during the Guaranty Period. In any of these events the issues which are raised by the affidavits of defense would not have arisen. How can it be contended that the State Commission anticipated all of these possibilities? The opinion of the State Court views the report of the Commission in Complaint Docket No. 3206 as a holding that if a petition for reparation should later be filed, if the petitioner should prove its claim to reparation, if the interstate Commerce Commission should not by that time have approved a reduction of the rates and if objection to the issuance of a reparation order should then be made on the ground that it violated the Transportation Act, 1920, the reparation order would nevertheless be valid. Surely it is impossible to read all of this into the language of the State Commission's decision in Com-

plaint Docket No. 3206. If such was not its effect, then the issues raised by the affidavits of defense could not have been the subject of an appeal therefrom. And, if the Commission had attempted to announce such a decision it would have been conjectural and an appeal to the courts therefrom would have been premature.

The Supreme Court of Pennsylvania, itself, so held in the case of *Lehigh & New England* v. *Public Service Commission,* 277 Pa. 493, a decision which is irreconcilable with its decision in the present case. In the *Lehigh & New England Case* it appeared that the State Commission had, as in Complaint Docket No. 3206, announced a decision that rates were unreasonable during the Guaranty Period and would be unreasonable for the future, had made an order fixing the rates for the future, but as to the Guaranty Period had simply stated that it would entertain further proceedings to determine the complainant's right to reparation. The railroad followed the course which the State court has held the plaintiffs-in-error here should have pursued and appealed to the courts directly from this decision of the State Commission. In its appeal it attacked the action of the State Commission both in fixing rates for the future and in announcing that it would entertain further proceedings to determine the complainant's right to reparation on shipments during the Guaranty Period. In respect to so much of the appeal as related to reparation on the shipments moving during the Guaranty Period the Superior Court in its opinion, *Lehigh & New England* v. *Public Service Commission,* 79 Pa. Sup. Ct. 540, speaking through Mr. Justice Linn, held (pp. 554, 555):

> "4. Appellant objects that the commission retained 'jurisdiction of the case in the matter of reparation.' It contends that the Transportation Act prohibits granting reparation by providing in Section 208a that the rates in effect on Feb-

ruary 29, 1920, when federal control terminated, 'shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, but prior to September 1, 1920, no such rate, fare or charge shall be reduced * * * unless such reduction or change is approved by the (Interstate Commerce) Commission.' During federal control both interstate and intrastate rates were made effective from time to time by the railroad administration, pursuant to Congressional authority. Necessarily during that period, state statutes prescribing how intrastate rates should become effective, were in abeyance. N. P. R. Co. v. North Dakota, 250 U. S. 135. In order that there might be no question that the rates prescribed by the railroad administration, and not the intrastate rates which had been effective pursuant to state statutes when Federal control was taken, should continue effective on March 1, 1920, section 208(a) prescribed the status of the rates on the first of March, 1920, and until changed as specified. *Whether or not the section prohibits the granting of reparation is not before us on this record; at best that part of the order is interlocutory. There is nothing showing what questions may be raised on the subject.* Moreover, article VI, section 17 of the Public Service Company Law, July 26, 1913, P. L. 1374, provides that ' * * * There shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided.' Article V, section 5, provides for reparation specified, and it is apparent from the opinion written by Mr. Justice Simpson, in N. Y. & P. Co. v. N. Y. C. R. R. Co., 267 Pa. 64, that article V, section 5, 'plainly requires the petition for reparation to be filed after the final decision on the question of the reasonableness of the rates.' Accordingly, the power company's prayer for reparation contained in the complaint that the rate was unreasonable, perhaps amounts to no more than notice that claim for reparation will be made if the rate be held unreasonable. *We cannot reverse because the*

commission has given notice that it will hear a claim for reparation if presented by the power company.'' (Italics ours.)

This decision was affirmed by the Supreme Court of the State in the opinion above referred to.

As construed by the Supreme Court of Pennsylvania in the *Lehigh & New England Case* and as construed by the same court in the case at bar, the Public Service Company Law of Pennsylvania does not permit raising the objection that a decision of the State Commission is contrary to Section 208(a) of the Transportation Act, 1920, by an appeal therefrom prior to the entry of an order for reparation, and then if an appeal is not taken prior to the entry of a reparation order prohibits raising the objection after the order has been issued. In other words, the State statute, as the court construes it, prevents any review of the Federal question. It is plain that either the State court must be wrong or that a State law which renders it impossible to obtain an adjudication of a Federal question is invalid. Whichever may be the fact the situation is certainly one which calls for a review of the State court's decision by this Court.

(c) The Federal Question goes to the entire Case, including the Effect of the Failure to appeal from the Decision of the Public Service Commission in Complaint Docket No. 3206.

The defendant-in-error in support of its motion cites decisions of this court to the effect that a decision of a State court will not be reviewed if placed upon an independent State ground broad enough to sustain the judgment.

It is not contended that the Federal question here presented was not discussed and decided by the State court. The opinion of that court is sufficient to indicate that the

State court did undertake to pass upon the question. (Record p. 94). This Court has held that when a Federal question has been expressly passed upon by a State Court its decision may be reviewed. *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248.

Even if, however, the Supreme Court of the State based its conclusion on the failure to appeal from the decision of the Public Service Commissionin Complaint Docket No. 3206 we submit that this is not a decision upon an independent State ground since the objection under the Federal statute goes to the entire case and the decision even on this apparent State ground involves the determination of the Federal issue.

It has been held that where, although a State court seeks to base its decision upon a State law, nevertheless, the Federal question raised goes to the whole case, this Court will review the decision of the State Court. *West Chicago R. R.* v. *Chicago,* 201 U. S. 506.

This has been held to be so even where the State court fails to discuss the Federal question. *Harding* v. *Illinois,* 196 U. S. 78; *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427.

In the case at bar it is submitted that the Federal question goes to the entire case including the issue under the provisions of the State law with respect to appeals from decisions of the State Commission. The decision of the State court on this feature of the case is based upon the provisions of the Public Service Company Law, and depends upon the controlling effect of that statute with respect to the rates on the shipments involved and the decision of the State Commission with reference thereto. Its decision in favor of defendant-in-error amounts to a determination that the Public Service Company Law is valid and controlling with respect to the facts of this case, regardless of the requirements of the

Transportation Act, 1920. We assert on the other hand that whatever may be the provisions of the Public Service Company Law, since the rates charged on the shipments involved in this case were the rates in effect on February 29, 1920, and since the Interstate Commerce Commission has approved no reduction in those rates, they were lawful under the Federal Statute, and a State statute which would give a cause of action for a refund of a portion of those rates is invalid.

CONCLUSION

For the reasons herein submitted it is urged that the motion to dismiss the Writ of Error should be denied.

Respectfully submitted,

HENRY WOLF BIKLE,
FREDERIC D. McKENNEY,
PARKER McCOLLESTER,
Attorneys for Plaintiffs-in-Error.

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WM. R. STANS
CL

Supreme Court of the United States

[No. 230]

OCTOBER TERM, 1925

NEW YORK CENTRAL RAILROAD COMPANY
and
PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR

HENRY WOLF BIKLÉ,
FREDERIC D. MCKENNEY,
PARKER MCCOLLESTER,
For Plaintiffs-in-Error.

E. W. TRAVER, Law Printer, 200 Broadway, N. Y. (Tel. Cortlandt 2090).

SUBJECT INDEX

	PAGE
List of Citations	xvii.
Reference to official report of opinion of court below	1
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	1–6
Opinion of court below modified and petition for reargument denied September 29, 1924	1–2
Suit brought under Public Service Company Law of Pennsylvania to enforce reparation order of State Commission requiring refund of difference between freight charges collected on shipments during Guaranty Period and charges found by State Commission to be reasonable	2
Charges collected based on rate in effect February 29, 1920. No reduction therein approved by Interstate Commerce Commission	2
Plaintiffs-in-error claim rate lawful under Section 208(a) of Transportation Act, 1920, and therefore no cause of action under State law.	2–3
Court below ruled rate controlled by State law.	3
Court below also ruled that under provisions of Public Service Company Law failure of plaintiffs-in-error to appeal from decision of State Commission in proceeding prior to that in which reparation order here sued upon was made prevented asserting defense under Federal statute	3–4
Jurisdiction of this Court invoked under Section 237 of the Judicial Code	4
List of cases believed to sustain judgment of the Court:	4–6
That writ of error was seasonably applied for	4
That there is drawn in question the validity of a law or authority under a State on ground that they are in conflict with Federal statute	5

PAGE

That decision of State Court that defendant-in-error is entitled to judgment because of failure of plaintiffs-in-error to appeal from decision of State Commission in earlier proceeding was not a decision on an independent State ground sufficient to sustain judgment and depriving this Court of jurisdiction.... 5–6

STATEMENT OF THE CASE. 7–13

Suit brought under Article V, Section 5, of Public Service Company Law of Pennsylvania to enforce reparation order of State Commission in Docket No. 4738 directing refund of difference between freight charges collected on shipments of coal on basis of rate of $1.10 per ton and charges on basis of rate of $1.00 per ton which State Commission found reasonable 7

Lines of plaintiffs-in-error operated by Director General under Federal control and rate of $1.10 established by Director General and in effect on February 29, 1920, when Federal control terminated..... 7–8

Rate of $1.10 found reasonable by Interstate Commerce Commission for period of Federal control .....

New York & Pennsylvania Co. v. *Director General*, 58 I. C. C. 124..... 8

Interstate Commerce Commission has never approved a reduction in rate below $1.10... 8

Complaint filed with Public Service Commission of Pennsylvania in February, 1920, Docket No. 3206, alleging rate of $1.10 would violate Public Service Company Law after March 1, 1920..... 8–9

Decision of State Commission not announced until August 17, 1921..... 9

Only order then made prescribed rates for future 9

As to Guaranty Period decided reasonable rate would have been $1.00, but made no order enforcing this rate..... 9

PAGE

Announced it would thereafter entertain petition for reparation on past shipments..... 10

Carriers complied with order fixing rate for future 10

As to Guaranty Period carriers believed that since Commission made no order, decision was not subject to appeal and that under Public Service Company Law no action should be taken until issuance of reparation order and suit for its enforcement..... 10

Second petition to State Commission filed by defendant-in-error, Docket No. 4738, seeking reparation on shipments moving since March 1, 1920.....10–11

Reparation order issued and this suit brought to recover amount awarded on shipments during Guaranty Period..... 11

Plaintiffs-in-error by their affidavits of defense set up claim that charges collected were lawful under Transportation Act, 1920, since based on rate in effect on February 29, 1920, and since no reduction therein had been approved by the Interstate Commerce Commission 11

Motion by defendant-in-error for judgment for want of sufficient affidavits of defense.....11–12

Judgment entered for defendant-in-error..... 12

On appeal, judgment affirmed..... 12

ASSIGNMENTS OF ERROR INTENDED TO BE URGED.....14–15

OUTLINE OF ARGUMENT.....16–21

ARGUMENT 22–87

I.

The writ of error should not be dismissed.....22–65

(A) The affidavits of defense challenged validity of a law of or an authority under the State of Pennsylvania on ground of their repugnance to Section 208(a) of Transportation Act, 1920, and decision of State Court was in favor of validity 22–28

PAGE

Suit brought solely under Article V, Section 5, of Public Service Company Law giving cause of action to enforce reparation order of State Commission and making such order *prima facie* evidence of facts therein stated 22–23

No cause of action exists unless reparation order in Docket No. 4738 is valid and Public Service Company Law applicable and valid 23

Decision of State Court affirmed their validity. 23–24

1. Reparation order of Public Service Commission was a statute of or an authority exercised under a State within meaning of Section 237 of Judicial Code..... 24–26

Decisions of this Court indicating that order of a State administrative tribunal is statute of or authority exercised under a State... 24

Situation not different here because the order in Docket No. 4738 is a reparation order instead of order fixing rates for future... 24–25

If State Commission in March, 1920, had made order fixing rates for Guaranty Period decision sustaining that order would have been reviewable here..... 25

Purpose of reparation order is to put parties in position in which they would have been had rate of $1.00 been established and in effect during Guaranty Period..... 25–26

2. Validity of Reparation Order of Public Service Commission in Docket No. 4738 was drawn in question on ground of its repugnance to Section 208(a) of Transportation Act, 1920 26

Affidavits of defense denied validity of reparation order in Docket No. 4738 on ground that it was in conflict with Section 208(a) of Transportation Act, 1920, and asserted that rates were lawful under Federal statute 26

PAGE

3. Validity of Public Service Company Law of Pennsylvania was drawn in question on ground that it was in conflict with Section 208(a) of Transportation Act, 1920.....27–28

By their affidavits of defense plaintiffs-in-error asserted rate charged was lawful under Transportation Act, 1920, that therefore provisions of Public Service Company Law were superseded, and that State statute which purported to make reparation order *prima facie* evidence and give cause of action for its enforcement was inoperative and invalid 27

Not necessary that validity of State statute in its entirety be attacked, but merely that its validity be challenged insofar as it is claimed to be applicable to this case;

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282 27

Situation in this case similar to that in *Northern Pacific Ry.* v. *North Dakota*, 250 U. S. 135, where decision of State Court was reviewed on writ of error.....27–28

(B) The fact that State Court decided under Public Service Company Law of Pennsylvania defendant-in-error was entitled to recover because of failure of plaintiffs-in-error to appeal from decision of State Commission in Docket No. 3206 does not warrant the dismissal of writ of error.....28–65

Although complaint in Public Service Commission Docket No. 3206 filed prior to March 1, 1920, Commission's decision not announced until August 17, 1921..... 29

Commission merely decided that rate of $1.10 had been unreasonable for Guaranty Period to extent it exceeded $1.00, but made no order to give effect to decision..... 29

Distinction between a mere decision that a rate is unreasonable and an order requiring that certain rate be made effective or that charges be adjusted to basis of certain rate 29–30

PAGE

As to Guaranty Period adjustment to basis of $1.00 rate could be enforced only by payment of reparation and no reparation order was made by Commission until subsequent to proceeding in Docket No. 4738.. 30

Article VI, Section 17, of Public Service Company Law provides that there should be no appeal from reparation order, but that suit shall be brought for enforcement..... 31

Article V, Section 5, of Public Service Company Law provides for such suit and makes reparation order *prima facie* evidence of facts stated 31–32

Carriers did not appeal from decision in Docket No. 3206 since they willingly complied with order fixing rate for future and believed that question as to charges during Guaranty Period should await issuance of reparation order and a suit thereon..... 32

Defendant-in-error filed subsequent petition with State Commission in Docket No. 4738 seeking reparation 32

Reparation order issued and suit brought for its enforcement 32–33

1. Decision of State Court is not decision on independent State ground sufficient to sustain judgment since Federal issue goes to entire case 33–36

Decision with respect to failure to appeal based on provisions of Public Service Company Law 35

Assertion that rate was lawful under Section 208(a) of Transportation Act, 1920, denied applicability of State law to case, including provision relating to appeal upon which decision below was in part based. Therefore insofar as this decision is based on State statute Court below decided Federal statute not controlling and determined the Federal question 35

PAGE

2. State Court expressly decided Federal question and it cannot be said that its judgment was not based upon this decision...36–38

In *North Carolina RR.* v. *Zachary*, 232 U. S. 348, this Court held that although Federal question not raised in manner provided by State statute if it is actually considered and decided by State Court the State Court's decision may be reviewed..... 36

Court below discussed Federal question at length and decided that Transportation Act, 1920, had no application to State rates during Guaranty Period..... 36

Language of State Court's decision to this effect quoted 36–38

3. Circumstances of this case are such that this Court should itself review record to ascertain whether Federal question sought to be raised by their affidavits of defense was waived by failure of plaintiffs-in-error to appeal from decision of Public Service Commission in Docket No. 3206 and should hold that such failure to appeal did not constitute a waiver of defense under the Federal statute and that State Court's decision to contrary was so clearly erroneous as not to be conclusive upon this Court...39–65

(a) Whether or not Federal question has been waived is itself a Federal question as to which this Court is not bound by decision of State Court, but should itself review record to ascertain whether such was fact and even if State Court's decision purports to be based in part on an independent State ground this Court is not concluded thereby if such decision was based upon a mistaken understanding of facts or of Federal questions sought to be raised, or was so clearly erroneous as to be arbitrary.....39–42

Whether Federal issue has been raised is a Federal question;

Carter v. *Texas*, 177 U. S. 442, 447;

Mitchell v. *Clark*, 110 U. S. 663, 645.....39–40

PAGE

Whether a party is estopped to assert a defense relied upon under Federal Constitution or Federal statute is question as to which this Court will review record;
Union Pacific RR. v. *Public Service Comm.*, 248 U. S. 67, 69..... 40

Where non-federal ground is so interwoven with Federal ground that it cannot be considered independent or where decision on Federal ground is so erroneous as to be arbitrary a decision on non-federal ground does not prevent a review by this Court of Federal question;
Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157, 164.....40–41

On facts quite similar to those in case at bar this Court has held that decision of State Court may be reviewed by it;
First National Bank v. *Anderson* (decided Jan. 4, 1926), 46 S. Ct. 135....41–42

No case has been found where this Court has held itself concluded by a decision of State Court on supposedly independent State ground where decision of State Court was based on complete misunderstanding of facts and nature of Federal issues to be raised 42

(b) Defense under Federal statute in this case was asserted at earliest possible moment in this suit, namely, in affidavits of defense to statement of claim in Trial Court. This was proper time and manner to asert defense
Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291 42–43

(c) Decision of State Court was based upon an erroneous understanding of facts and issues in that State Court considered that issues raised related to State Commission's decision and order fixing rate of $1.40 for future and not, as was the fact,

PAGE

to the reparation order requiring a reduction in rate of $1.10 charged during Guaranty Period 43–44

Language of State Court's opinion indicates that that Court thought that it was action of State Commission in fixing a rate of $1.40 for future which was under review.. 43

State Court's decision based upon an erroneous understanding of facts should not be accepted as conclusive by this Court 44

(d) Failure to appeal from decision of State Commission in Docket No. 3206 would constitute a waiver of defense relied upon only if issue raised by defense were there decided by Commission and subject to review on appeal 45–50

Decision of State Court was therefore erroneous since it was based upon erroneous impression of facts that issues raised by affidavits of defense were submitted to and decided by State Commission in Docket No. 3206 when such was not, and in the nature of things could not have been the fact 45

State Court's opinion indicates that it was impression of Court that issues raised by affidavits of defense were submitted to and decided by State Commission in Docket No. 3206 45–46

Such was not the case 46

Defense rests upon provisions of Section 208(a) of Transportation Act, 1920, that no rate should be reduced during Guaranty Period without approval of Interstate Commerce Commission 46

State Commission in Docket No. 3206 did not decide Federal question unless it decided that it could enforce a lower rate during Guaranty Period without Interstate Commerce Commission's approval 46

PAGE

A mere decision that rate was too high without an order requiring adjustment of charges to basis of a lower rate was not a decision that such an order could be enforced without Interstate Commerce Commission's approval and was therefore not a decision of Federal question..... 46

At the time Commission's decision in Docket No. 3206 was announced reduction in rates during Guaranty Period could be enforced only by a reparation order directing a refund of a portion of the charges collected.46–47

No intention to render such a decision can be found in language of State Commission's report in Docket No. 3206 48

In Docket No. 3206 State Commission made no reparation order and did not decide that defendant-in-error was entitled to reparation 48

In fact it reserved the question of reparation for a subsequent proceeding..... 49

(e) Failure to appeal from decision of State Commission in Docket No. 3206 could constitute a waiver of defense relied upon only if such an appeal could have presented issues raised by defense for adjudication. State Court's decision that the defense had been waived was clearly erroneous since such an appeal would have been premature and could not properly have presented issues for adjudication.....50–52

This is a suit for reparation and issue is enforcibility of the State Commission's reparation order 50–51

In Docket No. 3206 State Commission made no reparation order but definitely announced that issuance of such an order would await subsequent proceeding 51

Defendant-in-error had not proved its damage and its right to reparation..... 51

PAGE

Approval by Interstate Commerce Commission to a reduction in rates might have been obtained before reparation order was issued in which event question of enforcibility of order in face of Section 208 (a) of Transportation Act, 1920, would not have arisen 51

Appeal from State Commission's decision in Docket No. 3206 would have therefore been premature to raise question of enforcibility of a reparation order in the face of Federal statute 51–52

(f) Action of plaintiffs-in-error in not appealing from the State Commission's decision in Docket No. 3206 was in accordance with provisions of Public Service Company Law as interpreted by State Courts in previous decisions with which decision in case at bar is so in conflict as to be clearly arbitrary..52–59

(g) The cases cited by defendant-in-error in support of its motion to dismiss do not require dismissal of the writ of error on the facts in this case 60–66

Enterprise Irrigation District v. *Canal Co.,* 243 U. S. 157, distinguished..... 60

Minnesota, etc. Ry. v. *Washburn Co.,* 254 U. S. 370, distinguished 61

Nickel v. *Cole,* 256 U. S. 222, distinguished 62

Howat v. *State of Kansas,* 258 U. S. 181, distinguished 62–63

Central Union Telephone Co. v. *City of Edwardsville* (decided November 23, 1925) 70 L. ed. (Adv. 113), distinguished 63–65

II

Even if the writ of error was improperly sought this Court should allow the writ of certiorari in order to review the decision of the Court below.....66–68

PAGE

Defense asserted is right of carriers under Section 208(a) of Transportation Act, 1920, to collect freight charges on shipments during Guaranty Period on basis of rate in effect on February 29, 1920 66–67

Petition for writ of certiorari has been filed and action thereon withheld pending consideration of case on writ of error..... 67

Reasons outlined in connection with I(B), above, support jurisdiction of this Court to review Federal question on writ of certiorari 67

III

By reason of Section 208(a) of the Transportation Act, 1920, the fact that the charges collected on shipments moving between March 1 and September 1, 1920, were based upon the rate in effect on February 29, 1920, and the further fact that no reduction in that rate for the period prior to September 1, 1920, had or has been approved by the Interstate Commerce Commission constitute a complete defense to the suit of the defendant-in-error under Article V, Section 5, of the Public Service Company Law of Pennsylvania to enforce the reparation order made by the State Commission relating to such shipments..... 68–87

(A) Section 208(a) of Transportation Act, 1920, was intended to and by its terms did apply to intrastate transportation..... 69–73

Its language clearly indicates this, otherwise no meaning in reference to "State authority" in first clause 69–70

This is borne out by purpose of statute which was to provide stable basis of rates after Federal control and prevent immediate application of State laws fixing rates lower than had been established by Director General 70–71

PAGE

This purpose particularly evident in connection with last clause of Section 208(a) of Transportation Act, 1920, prohibiting reduction during Guaranty Period without approval of the Interstate Commerce Commission since this prohibition was intended as a protection to Congress in its guaranty of the carriers' revenues and was designed to preserve Federal control over all rates during continuance of guaranty..... 71

Legislative history indicates that Congress intended section to apply to intrastate rates 71–73

(B) Section 208(a) of Transportation Act, 1920, is not unconstitutional as applied to intrastate rates 73–76

Legislation looked to demobilization of national resources and was enacted by Congress in exercise of its War power 73

War power extends to demobilization as well as to initiation and carrying on of war.... 73

Commercial Trust Co. v. *Miller*, 251 U. S. 51, 57..... 74

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146..... 74

Ruppert v. *Caffey*, 251 U. S. 264..... ..73–74

Taking over of railroads by Federal Government was exercise of War power and therefore their return at termination of War is exercise of same power..... 74

Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135..... 74

Stewart v. *Kahn*, 11 Wall. 493, 507.... 74

Public Service Comm. v. *New York Central R.R.*, 230 N. Y. 149, 153..... 75

Michigan Central R.R. v. *Public Utilities Comm.*, 271 Fed. 319.....75–76

Since Section 208(a) of Transportation Act, 1920, is exercise of War power and not of

PAGE

power to regulate interstate commerce its application to State rate here is not prevented by fact that this rate does not affect interstate commerce 76

(C) The prohibition of Section 208(a) of Transportation Act, 1920, of a reduction in rates during Guaranty Period without approval of Interstate Commerce Commission renders unenforcible under State law a reparation order of State Commission awarding reparation on intrastate shipments in amount of difference between rate in effect on February 29, 1920, and a lower rate unless reduction approved by Interstate Commerce Commission 77–84

Enforcement of reparation order would effect a retroactive reduction in rates for Guaranty Period since it would put parties in position in which they would have been had rate in effect been $1.00 instead of $1.10..77–78

Purpose of Congress in enacting Section 208 (a) of Transportation Act, 1920, and particularly last clause thereof clearly indicates that retroactive reduction through reparation on shipments during Guaranty Period without Interstate Commerce Commission's approval is prohibited since clause was designed to protect carriers' revenues guaranteed by Federal Government and these revenues would be effectively depleted if refunds of amounts collected could be required by State authority 78–79

Suggestion of Court below that reparation order in Docket No. 4738 merely effected a correction and not a reduction in rates is unsound 79–84

(D) The rates charged on shipments involved in case were lawful under Section 208(a) of the Transportation Act, 1920, and therefore not unlawful under the State Public

PAGE

Service Company law and no suit for damage for violation of that statute can be maintained 85–87

Freight charges collected were based on rate in effect on February 29, 1920. This rate had been held lawful and reasonable by Interstate Commerce Commission..... 85

No reduction therein had been approved by Interstate Commerce Commission for Guaranty Period and therefore rate was lawful under language of Section 208(a) of Transportation Act, 1920..... 85

Rate being lawful under Federal statute its collection could not constitute a violation of State Public Service Company law, for to hold otherwise would amount to denying to Federal statute its controlling effect..... 85–8

The fact that Interstate Commerce Commission has ruled that it is without power to approve payment of reparation on intrastate shipments during Guaranty Period is immaterial. Result is merely that since such approval is withheld rate was lawful and no right to damages exists because collection of rate was not an unlawful act.....86–87

CONCLUSION 88

Appendix 89

Transportation Act, 1920

Section 208(a) 89

Section 209 90

Public Service Company Law of Pennsylvania

Section 5 95

Section 17 96

Section 31 97

Section 41 98

LIST OF CASES CITED

PAGE

Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S., 134 ..... 5, 16, 24

Armour & Co. v. G. N. Ry. Co., 104 I. C. C., 34..... 86

Carter v. Texas, 177 U. S., 442..... 6, 18, 39

Central Union Telephone Co. v. City of Edwardsville (decided Nov. 23, 1925) 70 L. ed. (Adv. 113)... 20, 63, 65

Cherokee Nation v. Whitmore, 223 U. S. 108..... 4

Chicago, B. & Q. Ry. v. Drainage Commrs., 200 U. S., 561 ..... 5, 17, 34

Commercial Trust Co. v. Miller, 262 U. S. 51..... 21, 74

Corn Products Refining Co. v. Eddy, 249 U. S., 427. 5, 17, 34

Dahnke-Walker Co. v. Bondurant, 257 U. S., 282... 5, 16, 27

Dryfoos v. Edwards, 284 Fed. 596..... 21, 74

Enterprise Irrigation District v. Canal Co., 243 U. S., 157 ..... 5, 18, 19, 40, 60

First National Bank v. Anderson (decided Jan. 4, 1926), 46 S. Ct. 135..... 5, 18, 41

Hamilton v. Kentucky Distilleries Co., 251 U. S., 146. 21, 74

Harding v. Illinois, 196 U. S. 78..... 6, 17, 34

Howat v. State of Kansas, 258 U. S., 181..... 20, 62

Increased Rates, 1920, Ex Parte 74, 58 I. C. C., 220... 8

Kingman v. Western Mfg. Co., 170 U. S. 675..... 4

Lake Erie & W. R. R. Co. v. Public Utilities Comm., 249 U. S., 422..... 5, 16, 24

PAGE

Lehigh & N. E. R. R. Co. v. Public Service Comm., 277 Pa., 493 ..... 19, 54, 82

Lehigh & N. E. R. R. Co. v. Public Service Comm., 79 Pa. Sup. Ct., 540 ..... 19, 54

Michigan Central R. R. Co. v. Michigan Public Utilities Comm., 271 Fed., 319 ..... 21, 75

Minnesota, etc. Ry. v. Washburn Co., 254 U. S., 370 .. 20, 61

Mitchell v. Clark, 110 U. S., 633 ..... 6, 18, 39

Mutual Life Insurance Co. v. McGrew, 188 U. S., 291 ..... 6, 18, 42

Newport & S. V. R. R. Co. v. Public Service Comm., 75 Pa. Sup. Ct., 28 ..... 19, 53

New York Central R. R. Co. v. Public Service Comm., 268 Fed., 558 78

New York & Pennsylvania Co. v. N. Y. C. R. R. Co., P. U. R., 1921, E. p. 80 9

New York & Pennsylvania Co. v. Director General, 58 I. C. C., 124 8

New York & Pennsylvania Co. v. N. Y. C. R. R. Co., P. U. R., 1924, E. p. 803 (Abstracted) 7

New York & Pennsylvania Co. v. N. Y. C. R. R., 267 Pa., 64 ..... 19, 54

New York & Pennsylvania Co. v. N. Y. C. R. R., 281 Pa., 257 ..... 1, 36, 43, 44, 45

Nickel v. Cole, 256 U. S., 222 ..... 20, 62

North Carolina R. R. Co. v. Zachary, 232 U. S., 348 . 6, 17, 36

Northern Pacific Ry. Co. v. North Dakota, 250 U. S., 135 ..... 5, 16, 20, 27, 28, 70

Northern Pacific Ry. Co. v. Solum, 247 U. S., 477 ... 5

Ohio Valley Co. v. Ben Avon Borough, 253 U. S., 287 ..... 5, 16, 24

Pennsylvania R. R. Co. v. Public Service Comm., 250 U. S., 566 ..... 5, 16, 24

PAGE

Public Service Comm. v. N. Y. C. R. R. Co., 230 N. Y., 149 ..... 21, 75

Ruppert v. Caffey, 251 U. S., 264 ..... 21, 74

Stewart v. Kahn, 11 Wall, 493 74

Southern Pacific Co. v. Railroad Comm., 194 Cal. 734, 231 Pac., 28 ..... 21, 79, 86

Texas & Pacific Ry. v. Murphy, 111 U. S. 488 4

Union Pacific R. R. Co. v. Public Service Comm., 248 U. S., 67 ..... 5, 18, 40

United States v. Elliott, 223 U. S. 524 4

West Chicago R. R. v. Chicago, 201 U. S. 506 ..... 5, 17, 33

Federal Control Act, 40 Stat. L. 451 ..... 27, 28, 82

Federal Employer's Liability Act 36

Interstate Commerce Act, 41 Stat. L. 491 58

Judicial Code, Section 237 ..... 4, 5, 23, 24, 67

Public Service Company Law of Pennsylvania ..... 2, 7, 9, 11, 12, 22, 23, 26, 27, 29, 30, 31, 33, 35, 36, 42, 49, 50, 54, 55, 58, 84, 85, 95, 96, 97, 98.

Transportation Act, 1920, 41 Stat. L. 456 ..... 2, 11, 25, 71, 87, 89

Section 208(a) ..... 3, 10, 12, 22, 23, 26, 27, 29, 46, 51, 57, 65, 66, 68, 69, 70, 71, 73, 75, 76, 77, 78, 79, 81, 82, 85, 86, 89.

Section 209 ..... 9, 78, 90

Conference Ruling, Mar. 13, 1922 (Interstate Comm. Comm.) 86

Report No. 456, 66th Congress (November 10, 1919) 71

Congressional Record, Nov. 11, 1919, Page 8314 72

Congressional Record, Nov. 13, 1919, Page 8451 73

Supreme Court of the United States

OCTOBER TERM, 1925. No. 230.

NEW YORK CENTRAL RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

vs.

NEW YORK & PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR

Reference to the Official Report of the Opinion Delivered in the Court Below

New York & Pennsylvania Co. v. *New York Central R. R. Co. et al.*, 281 Pa. 257.

Statement of the Grounds on which the Jurisdiction of this Court is invoked

1. Judgment for the defendant-in-error in the sum of $6,546.43 was entered in the Court of Common Pleas of Clinton County, Pennsylvania, on July 23, 1923 (R. 2). On appeal this judgment was affirmed by the Supreme Court of Pennsylvania, Eastern District, April 21, 1924, *New York & Pa. Co.* v. *N. Y. C. R. R.*, 281 Pa. 257. After the presen-

tation of a petition for reargument the opinion filed by this Court was withdrawn May 19, 1924. The judgment was again affirmed July 8, 1924. A second petition for reargument was filed. On September 29, 1924, the opinion was modified and reargument was denied (R. 49, 50).

2. This suit was brought under the provisions of the Public Service Company Law of Pennsylvania (Act July 26, 1913, P. L. 1374, as amended) to enforce a reparation order made by the State Commission awarding to the defendant-in-error reparation in the amount that the freight charges collected by the plaintiffs-in-error from the defendant-in-error on certain shipments of coal transported between March 1, 1920, and September 1, 1920, exceeded lower charges which the State Commission found would have been reasonable (R. 4-6). It was alleged that the freight charges collected were unreasonable and in violation of the Public Service Company Law of the State as declared by the Public Service Commission.

The freight charges collected were based upon the rate of $1.10 per ton in effect on February 29, 1920. This rate had been held by the Interstate Commerce Commission to be a just, reasonable and lawful rate for the period prior to and including February 29, 1920, and no reduction therein had been approved by the Interstate Commerce Commission as applied to shipments transported prior to September 1, 1920.

On these facts the plaintiffs-in-error claimed in the Court below that the charges collected were lawful under the Transportation Act, 1920 (Act of Congress, Feb. 28, 1920, 41 Stat. L. 456) and therefore could not be unlawful in violation of the Public Service Company Law of the State; that the reparation order of the State Commission was null and void and that the Public Service Company

Law of the State afforded no cause of action for its enforcement because it and the order thereunder were in conflict with Section 208(a) of the Transportation Act, 1920 (41 Stat. L. 464), providing that all rates in effect on February 29, 1920, on the lines of carriers subject to the Interstate Commerce Act should continue in effect until changed as therein provided and that no reduction in such rates should be made prior to September 1, 1920, without the approval of the Interstate Commerce Commission (R. 22-36).

The lower Court ruled that after March 1, 1920, intrastate rates were subject to the exclusive control of the State Commission; that beginning with March 1, 1920, the determination of the reasonableness of charges as to intrastate traffic was solely within the jurisdiction of the State authorities, and that the reparation order of the State Commission should be enforced (R. 94).

In the Court below the defendant-in-error, besides asserting the exclusive authority of the State law, claimed that the failure of the plaintiffs-in-error to appeal to the courts from a decision of the State Commission in an earlier proceeding constituted a waiver by them of the contention that the right of recovery of the defendant-in-error was prevented by Section 208(a) of the Transportation Act, 1920, and that therefore this defense could not be asserted in the present suit (R. 36, 39). In answer to this the plaintiffs-in-error claimed that the issues raised by their defense were not and could not have been raised in the earlier proceeding before the State Commission; that these issues were not decided by the State Commission and therefore could not have been reviewed on appeal from the State Commission's decision; that any appeal from this decision would have been premature and ineffectual to raise the

issues for adjudication (R. 78, 83); that if the Public Service Company Law was applicable at all, the failure to appeal from the earlier decision of the State Commission was in accordance therewith since this statute, as previously construed by the highest Court of the State, rendered an appeal improper to raise the issue of the validity of a reparation order (R. 62, 84, 95); and finally that if, as plaintiffs-in-error contended, the rates charged were lawful under the Transportation Act, 1920, they were not subject to the State Law and the provisions of the State Law relied upon by the defendant-in-error were of no effect (R. 86).

With respect to these conflicting claims the lower Court ruled that the federal issue raised by the affidavits of defense had been raised before and decided by the State Commission in the earlier proceeding (R. 91, 92); that the failure of the plaintiffs-in-error to appeal from this decision was a waiver of their claim (R. 92, 93); that regardless of the provisions of the Transportation Act, 1920, the Public Service Company Law was controlling (R. 94), and that thereunder the defendant-in-error was entitled to judgment (R. 95).

3. The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (Act of Congress, Mar. 3, 1911, 36 Stat. L. 1156; Act of Congress, Dec. 23, 1914, 38 Stat. L. 790; Act of Congress, Sept. 6, 1916, 39 Stat. L. 726; Act of Congress, Feby. 17, 1922, 42 Stat. L. 366).

4. The cases believed to sustain the jurisdiction of this Court are the following:

(a) That the writ of error was seasonably applied for:

United States v. *Elliott,* 223 U. S., 524;
Cherokee Nation v. *Whitmore,* 223 U. S. 108;
Kingman v. *Western Mfg. Co.,* 170 U. S. 675;
Texas & Pacific Ry. Co. v. *Murphy,* 111 U. S. 488.

(b) That the case comes within Section 237 of the Judicial Code, as amended, in that there is drawn in question the validity of a law of or authority under a State on the ground that they are in conflict with a federal statute and the decision of the State Court was in favor of their validity:

Dahnke-Walker Co. v. *Bondurant,* 257 U. S. 282;
Ohio Valley Co. v. *Ben Avon Borough,* 253 U. S. 287;
Pennsylvania R. R. Co. v. *Public Service Comm.,* 250 U. S. 566;
Northern Pacific Ry. Co. v. *North Dakota,* 250 U. S. 135;
Lake Erie & W. R. R. Co. v. *Public Utilities Comm.,* 249 U. S. 422;
Arkadelphia Co. v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134;
Northern Pacific Ry. Co. v. *Solum,* 247 U. S. 477.

(c) That the decision of the State Court that the defendant-in-error is entitled to judgment because of the failure of the plaintiffs-in-error to appeal from a decision of the State Commission in an earlier proceeding than that in which the order here sued upon was made was not a decision on an independent state ground sufficient to sustain the judgment, conclusive on this Court and depriving it of jurisdiction:

First National Bank v. *Anderson,* decided Jan. 4, 1926, 46 S. Ct. 135;
Corn Products Refining Co. v. *Eddy,* 249 U. S. 427, 432;
Union Pacific R. R. Co. v. *Public Service Comm.,* 248 U. S. 67, 69;
Enterprise Irrigation District v. *Canal Co.,* 243 U. S. 157, 164;
West Chicago R. R. v. *Chicago,* 201 U. S. 506, 519, 520;
Chicago, B. & Q. Ry. v. *Drainage Commrs.,* 200 U. S. 561, 580;

Harding v. *Illinois*, 196 U. S. 78;
Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291;
Carter v. *Texas*, 177 U. S. 442, 447;
North Carolina R. R. Co. v. *Zachary*, 232 U. S. 348;
Mitchell v. *Clark*, 110 U. S. 633, 645.

Statement of the Case

This is a suit brought by the defendant-in-error in the Court of Common Pleas of Clinton County, Pennsylvania, under Article V, Section 5, of the Public Service Company Law of that State (P. L. 1405) to enforce an order of the State Public Service Commission in a proceeding entitled *New York & Pennsylvania Co.* v. *N. Y. C. R. R. Co.,* P. U. R. 1924, E. p. 803 (abstracted), herein referred to as *Docket No. 4738,* directing the plaintiffs-in-error to pay reparation to the defendant-in-error in the amount of the difference between the freight charges paid by the defendant-in-error and charges which the State Commission found would have been reasonable on shipments of coal transported from mines in Pennsylvania to Lock Haven, Pennsylvania, during the period between March 1 and September 1, 1920, the so-called Guaranty Period.

The plaintiffs-in-error are common carriers engaged in interstate commerce and in intrastate transportation within the State of Pennsylvania. A line of the New York Central runs from mines in the so-called Munson and Hawk Run Districts of Pennsylvania to Bald Eagle Junction, Pennsylvania, where there is a connection with a line of the Pennsylvania Railroad leading thence to Lock Haven, Pennsylvania. The defendant-in-error is a large paper manufacturing company having a plant located at Lock Haven, Pennsylvania, and was the consignee of numerous shipments of coal transported from mines in the Munson and Hawk Run Districts to Lock Haven over the lines of the New York Central and the Pennsylvania Railroad just described (R. 4).

During the so-called Federal control period (December 28, 1917 to February 29, 1920) the lines of the Pennsylvania

Railroad and the New York Central Railroad were taken over by the President and were operated by him through the Director General of Railroads (R. 23, 33). On July 1, 1919, the Director General made effective a rate of 65 cents for the haul over the line of the New York Central from the mines to Bald Eagle Junction, the rate for the haul over the Pennsylvania from Bald Eagle Junction to Lock Haven being 45 cents. Thus the through combination rate became $1.10. This was an increase over the rate previously in effect (R. 28).

On a complaint to the Interstate Commerce Commission by the defendant-in-error here the through rate of $1.10 was found by that tribunal to be a just and reasonable rate for the period of Federal control (R. 25, 27-32, 35). *New York & Pennsylvania Co.* v. *Director General,* 58 I. C. C. 124.

The through rate of $1.10 was in effect on February 29, 1920, when Federal control terminated (R. 25, 35). This was the rate which was charged on the shipments of coal involved in this suit which were transported between March 1 and August 26, 1920 (R. 5), when following the Interstate Commerce Commission's decision in *Increased Rates, 1920, Ex Parte 74,* 58 I. C. C. 220, the rate of $1.10 was increased 40 per cent. to $1.54 (R. 25, 35).

The Interstate Commerce Commission has never approved a reduction in the through rate on coal from the mines to Lock Haven below the rate of $1.10 in effect on February 29, 1920 (R. 25, 35).

Shortly prior to March 1, 1920, when Federal control was about to terminate, the defendant-in-error filed a complaint with the Public Service Commission of Pennsylvania alleging that after the termination of Federal Control—

namely, after March 1, 1920—the through rate of $1.10 would be unlawful under the Public Service Company Law of the State because in excess of the rate prescribed by the State Commission in an order made by it on December 10, 1917, and that it would also be unreasonable in violation of the Public Service Company Law. The proceeding on this complaint, *New York & Pennsylvania Co.* v. *N. Y. C. R. R. Co.*, P. U. R., 1921, E. p. 80, was what is herein referred to as *Docket No. 3206* on the docket of the State Commission. A hearing was held before the State Commission in March, 1920, but no decision was announced by it until August 17, 1921, nearly a year after the end of the period of six months following the termination of Federal control, hereafter called the Guaranty Period, during which, by the terms of Section 209 of the Transportation Act, 1920 (41 Stat. L. 464), the Federal Government guaranteed the earnings of the carriers which had been under Federal control.

By its decision in *Docket No. 3206* the State Commission rejected the contention of the New York & Pennsylvania Company that the rate of $1.10 was unlawful merely because it was in excess of the rate prescribed by the same Commission in December, 1917 (R. 9). The State Commission concluded, however, that for the period from March 1, 1920 to August 25, 1920, the through rate of $1.10 had been unreasonable and that this rate should have been $1.00 per ton. For the period subsequent to August 26, 1920, and for the future, it found that the rate should have been and should be $1.40 instead of $1.54 (R. 11, 12).

This decision of the State Commission not being announced until more than one year after the transportation during the Guaranty Period had been performed, the only order which the State Commission could have made to give effect to its conclusion with respect to such transportation

would have been an order for the payment of reparation. The Commission, however, made no such order at this time, the only order which it did make being an order fixing the rates for the future (R. 12, 13, 14). As to reparation the Commission said: "Upon the presentation of a petition accompanied by the supporting data reparation will be awarded for freight charges paid in excess of the rates herein determined" (R. 12).

The carriers concluded to comply with the order of the State Commission fixing the rates for the future and therefore sought no appeal from this feature of the Commission's decision. Since the determination of the Commission as to the rates which would have been reasonable for the period from March 1, 1920 to September 1, 1920, was a determination as to past rates which could affect only the question of reparation, the carriers believed that an appeal from this decision of the Commission as to the reparation feature was not permitted by the Public Service Company Law and moreover that since no reparation order had been issued and since the New York & Pennsylvania Company might fail to prove its right to reparation no appeal could properly be taken at that time to raise the issue of the enforcibility of a reparation order under the provisions of Section 208(a) of the Transportation Act, 1920.

Thereafter the defendant-in-error filed another complaint with the State Commission which was given the State Commission's *Docket No. 4738* in which complaint reparation was asked on shipments moving since March 1, 1920 (R. 16). A hearing was had on this complaint and the Commission announced its conclusion that the New York & Pennsylvania Company was entitled to reparation on shipments moving from March 1, 1920 to August 25,

1920, both inclusive, to the extent that the freight charges collected exceeded those which would have been collected on the basis of a rate of $1.00 and that on shipments moving subsequent to August 26, 1920, it was entitled to reparation to the extent that the rate collected exceeded a rate of $1.40. Two reparation orders were made by the Commission, one directing the payment of reparation pursuant to this decision with respect to shipments transported between March 1, 1920 and August 31, 1920, both inclusive, and the other relating to the shipments transported subsequent to the Guaranty Period (R. 20, 21). The second order was complied with.

This is an action *in assumpsit* to recover the amount of the reparation awarded by the first order.

The statement of claim in the Trial Court alleged that the freight charges collected on the coal transported during the Guaranty Period were unreasonable and in violation of the Public Service Company Law of Pennsylvania to the extent that they exceeded charges on the basis of the rates found by the State Commission to be reasonable, and set forth the proceedings before the State Commission and the decisions and orders of the Commission (R. 4-21).

The plaintiffs-in-error in their affidavits of defense set up the claim that the charges collected on the shipments in question were lawful under the Transportation Act, 1920, since they were based on the rate of $1.10 in effect on February 29, 1920, and since no reduction in that rate had been approved by the Interstate Commerce Commission; that therefore the reparation order of the State Commission was void and that no cause of action existed under the Public Service Company Law of the State (R. 22-36).

Upon the filing of these affidavits of defense the de-

fendant-in-error obtained from the Trial Court a rule to show cause why judgment should not be entered for the defendant-in-error for want of sufficient affidavits of defense. The reasons alleged in support of this motion were (1) that under the provisions of Article VI, Section 31, of the Public Service Company Law (P.L. 1429) the plaintiffs-in-error were precluded from setting up the defense relied upon because of their failure to appeal from the decision of the State Commission in *Docket No. 3206* in which no reparation order was made; (2) that the reparation order issued in *Docket No. 4738,* which was sued upon, was not a reduction of a rate requiring the approval of the Interstate Commerce Commission under Section 208(a) of the Transportation Act, 1920, and (3) that after the termination of Federal control on March 1, 1920, the transportation, being entirely within the State, was subject to the Pennsylvania Public Service Company Law only and the provisions of Section 208(a) of the Transportation Act, 1920, were not applicable thereto (R.36-38).

The Trial Court entered judgment for the defendant-in-error on the pleadings and on appeal to the highest Court of the State this judgment was affirmed—the highest Court of the State deciding that Section 208(a) of the Transportation Act, 1920, could have no application to this transportation, since it was entirely within the State of Pennsylvania, and that therefore the provisions of the Public Service Company Law were controlling (R. 94), and holding also that under the provisions of the Public Service Company Law the failure of the plaintiffs-in-error to appeal from the decision of the State Commission in *Docket No. 3206* precluded them from asserting their defense under the Transportation Act, 1920, in opposition to the suit to recover the amount of the reparation awarded by the State Commission in *Docket No. 4738* (R. 92, 96).

The case comes to this Court on writ of error from the Supreme Court of Pennsylvania.

Realizing that there might be some question whether the contentions relied upon by the plaintiffs-in-error drew in question the validity of the State law and the order of the State Commission thereunder or whether they constituted an assertion of a right under a federal statute, which right was denied by the State Court, the plaintiffs-in-error have likewise filed with this Court a petition for writ of certiorari to review the action of the State Court. Consideration of the petition for a writ of certiorari has been postponed until the hearing of the case on the merits on the writ of error.

The defendant-in-error has moved to dismiss the writ of error for reason hereafter discussed and on the same grounds opposes the issuance of the writ of certiorari.

Assignments of Error Intended to be Urged

It is the intention of the plaintiffs-in-error to urge upon argument in this Court the following errors assigned in their assignments of errors (R. 99, 100):

1. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below erred for the reason that by virtue of Section 208(a) of the Transportation Act, 1920, the plaintiff below was without a cause of action under the Public Service Company Law of Pennsylvania.

2. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below and in affirming the judgment of the Court of Common Pleas of Clinton County on plaintiff's motion for judgment for want of a sufficient affidavit of defense, erred for the reason that the defendants' affidavits of defense stated a complete defense to the plaintiff's cause of action; namely, that the freight charges collected on the shipments of the plaintiff below were in accordance with the rates in effect on February 29, 1920; that no reduction in those rates as applied to shipments transported between March 1 and September 1, 1920, had been approved by the Interstate Commerce Commission as required by Section 208 (a) of the Transportation Act, 1920, and that therefore the order for reparation issued by the Public Service Commssion of Pennsylvania upon which the suit was predicated was void and unenforceable and the plaintiff below had no cause of action under the Public Service Company Law of Pennsylvania.

3. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the court below erred for the reason that the freight rates collected by the plaintiffs-in-error

on the shipments made by the plaintiff below were lawful under Section 208 (a) of the Transportation Act, 1920, and were therefore not in violation of the Public Service Company Law of Pennsylvania and the plaintiff below had no cause of action under the provisions of that Act.

4. The Supreme Court of Pennsylvania, Eastern District, erred in holding that Section 208 (a) of the Transportation Act, 1920, was not a restriction upon the power of the Public Service Commission of Pennsylvania to order a reduction in rates on shipments moving between March 1, 1920, and September 1, 1920.

5. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the order for reparation issued by the Public Service Commission upon which plaintiff's cause of action below was predicated was not a reduction in the rates on shipments moving between March 1, 1920, and September 1, 1920, and void by reason of the provisions of Section 208 (a) of the Transportation Act, 1920.

6. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the plaintiffs-in-error were precluded from setting up the defense relied upon by them because of their failure to appeal from the decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206."

Outline of Argument

I. THE WRIT OF ERROR SHOULD NOT BE DISMISSED.

A. The affidavits of defense challenged the validity of a law or an authority under the State of Pennsylvania on the ground of their repugnance to Section 208(a) of the Transportation Act, 1920, and the decision of the State Court was in favor of their validity.

1. The reparation order of the Public Service Commission was a statute of or an authority exercised under a State within the meaning of Section 237 of the Judicial Code.

Ohio Valley Co. v. *Ben Avon Borough*, 253 U. S. 287;
Pennsylvania R. R. Co. v. *Public Service Comm.*, 250 U. S. 566;
Lake Erie & W. R. R. Co. v. *Public Utility Comm.*, 249 U. S. 422;
Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134.

2. The validity of the reparation order of the Public Service Commission in *Docket No. 4738* was drawn in question on the ground of its repugnance to Section 208 (a) of the Transportation Act, 1920.

3. The validity of the Public Service Company Law of Pennsylvania was drawn in question on the ground that it was in conflict with Section 208 (a) of the Transportation Act, 1920.

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282;
Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135.

B. The fact that the State Court decided that

under the Public Service Company Law of Pennsylvania the defendant-in-error was entitled to recover because of the failure of the plaintiffs-in-error to appeal from the decision of the State Commission in *Docket No. 3206* does not warrant the dismissal of the writ of error.

1. This is not a decision on an independent State ground sufficient to sustain the judgment since the federal issue goes to the entire case.

West Chicago R. R. Co. v. *Chicago,* 210 U. S. 506, 519;
Corn Products Refining Co. v. *Eddy,* 294 U. S. 427, 432;
Harding v. *Illinois,* 196 U. S. 78;
Chicago, B. & Q. R. R. v. *Drainage Commrs.,* 200 U. S. 561, 560.

2. The State Court expressly decided the federal question and it cannot be said that its judgment was not based upon this decision.

North Carolina R. R. Co. v. *Zachary,* 232 U. S. 348.

3. The circumstances of this case are such that this Court should itself review the record to ascertain whether the federal question sought to be raised by their affidavits of defense was waived by the failure of the plaintiffs-in-error to appeal from the decision of the Public Service Commission of Pennsylvania in *Docket No. 3206* and should hold that such failure to appeal did not constitute a waiver of the defense under the federal statute, and that the State Court's decision to the contrary was so clearly erroneous as not to be conclusive upon this Court.

(a) Whether or not the federal issue has been waived is itself a federal question as to which this Court is not bound by the decision of

the State Court, but should itself review the record to ascertain whether such was the fact. And even if the State Court's decision purports to be based in part on an independent state ground this Court is not concluded thereby if such decision was based upon a mistaken understanding of the facts or of the federal issues sought to be raised, or was so clearly erroneous as to be arbitrary.

Carter v. *Texas*, 177 U. S. 442, 447;
Mitchell v. *Clark*, 110 U. S. 635, 645;
Union Pacific R. R. Co. v. *Public Service Comm.*, 248 U. S. 67;
Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157;
First National Bank v. *Anderson* (decided Jan. 4, 1926), 46 S. Ct. 135.

(b) The defense under Section 208 (a) of the Transportation Act, 1920, was asserted at the earliest possible moment in this suit.

Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291.

(c) The decision of the State Court was based upon an erroneous understanding of the facts and the issues in that the State Court considered that the issues raised related to the State Commission's decision and order fixing a rate of $1.40 and not, as was the fact, to the reparation order requiring a reduction in the rate of $1.10 charged during the Guaranty Period.

(d) The failure to appeal from the decision of the State Commission in *Docket No. 3206* could constitute a waiver of the defense relied upon only if the issues raised by this defense were there decided by the Commission and subject to review. The decision of the State Court was therefore erroneous since it was based upon

the erroneous impression of the facts that the issues raised by the affidavits of defense were submitted to and decided by the State Commission in *Docket No. 3206* when such was not, and in the nature of things could not have been, the fact.

(e) The failure to appeal from the decision of the State Commission in *Docket No. 3206* could constitute a waiver of the defense relied upon only if such an appeal could have presented the issues raised by the defense for adjudication. The State Court's decision that the defense had been waived was clearly erroneous since such an appeal would have been premature and could not properly have presented the issues for adjudication.

(f) The action of the plaintiffs-in-error in not appealing from the State Commission's decision in *Docket No. 3206* was in accordance with the provisions of the Public Service Company Law as interpreted by the State Courts in previous decisions with which the decision in the case at bar is so plainly in conflict as to be arbitrary.

Newport & S. V. R. R. Co. v. *Public Service Comm.*, 75 Pa. Superior Ct. 28;

New York & Pennsylvania Co. v. *N. Y. C. R. R. Co.*, 267 Pa. 64;

Lehigh & New England R. R. Co. v. *Public Service Comm.*, 79 Pa. Superior Ct. 540, 277 Pa. 493.

(g) The cases cited by defendant-in-error in support of its motion to dismiss do not require dismissal of the writ of error on the facts in this case.

Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157;

Minnesota, etc. Ry. v. *Washburn Co.*, 254 U. S. 370;
Nickel v. *Cole*, 256 U. S. 222;
Howat v. *Kansas*, 258 U. S. 181;
Central Union Telephone Co. v. *City of Edwardsville* (decided Nov. 23, 1925), 70 L. ed. (Adv. 113).

II. EVEN IF THE WRIT OF ERROR WAS IMPROPERLY SOUGHT THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI IN ORDER TO REVIEW THE DECISION OF THE COURT BELOW.

III. BY REASON OF SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, THE FACT THAT THE CHARGES COLLECTED ON SHIPMENTS MOVING BETWEEN MARCH 1 AND SEPTEMBER 1, 1920, WERE COMPUTED ON THE BASIS OF THE RATE IN EFFECT ON FEBRUARY 29, 1920, AND THE FURTHER FACT THAT NO REDUCTION IN THAT RATE FOR THE PERIOD PRIOR TO SEPTEMBER 1, 1920, HAD OR HAS BEEN APPROVED BY THE INTERSTATE COMMERCE COMMISSION CONSTITUTE A COMPLETE DEFENSE TO THE SUIT OF THE DEFENDANT-IN-ERROR UNDER ARTICLE V, SECTION 5, OF THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA TO ENFORCE THE REPARATION ORDER MADE BY THE STATE COMMISSION RELATING TO SUCH SHIPMENTS.

A. Section 208 (a) of the Transportation Act, 1920, was intended to and by its terms did apply to intrastate transportation.

Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135.

B. Section 208 (a) of the Transportation Act, 1920, is not unconstitutional as applied to intrastate rates.

Commercial Trust Co. v. *Miller*, 262 U. S. 51, 57;
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146;
Jacob Ruppert v. *Caffey*, 251 U. S. 264;
Dryfoos v. *Edwards*, 284 Fed. 596;
Public Service Comm. v. *New York Central R. R. Co.*, 230 N. Y. 149, 153;
Michigan Central R. R. Co. v. *Michigan Public Utilities Comm.*, 271 Fed. 319.

C. The prohibition of Section 208 (a) of the Transportation Act, 1920, of a reduction of rates during the Guaranty Period without the approval of the Interstate Commerce Commission renders unenforcible under the State law a reperation order of a State Commission awarding reparation on intrastate shipments in the amount of the difference between the rate in effect on February 29, 1920, and a lower rate unless reduction approved by the Interstate Commerce Commission.

Southern Pacific Co. v. *Railroad Comm.*, 194 Cal. 734, 231 Pac. 28.

D. The rates charged on the shipments involved in the case were lawful under Section 208 (a) of the Transportation Act. 1920. Therefore they were not unlawful under the State Public Service Company Law and no suit for damages for a violation of that statute can be maintained.

ARGUMENT

I

THE WRIT OF ERROR SHOULD NOT BE DISMISSED

Dismissal of the Writ of Error is sought upon two grounds. First, while it is agreed by the defendant-in-error that the Supreme Court of Pennsylvania made a decision with respect to the issues under Section 208 (a) of the Transportation Act, 1920, raised by the affidavits of defense, it is claimed that this was not a decision in favor of the validity of a State law or an authority exercised under a State whose validity had been drawn in question on the ground of its repugnance to a federal statute. Second, it is claimed that no review may be had in this Court because although the Court below decided the federal issue it also made a decision on an independent State ground broad enough to support its conclusion, in that it decided that the defense asserted under the federal statute had been waived by the failure of the plaintiffs-in-error to appeal to the courts from the decision of the State Commission in *Docket No. 3206.*

These two grounds will be considered in order.

A. THE AFFIDAVITS OF DEFENSE CHALLENGED THE VALIDITY OF A LAW OF OR AN AUTHORITY UNDER THE STATE OF PENNSYLVANIA ON THE GROUND OF THEIR REPUGNANCE TO SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, AND THE DECISION OF THE STATE COURT WAS IN FAVOR OF THEIR VALIDITY.

This suit was brought solely under Article V, Section 5, of the Public Service Company Law of Pennsylvania, the pertinent portion of which is as follows:

"If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be *prima facie* evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received."

The reparation order of the State Commission in *Docket No. 4738* was offered by the defendant-in-error as the basis of its suit and as *prima facie* evidence to sustain the allegation of the complaint that the charges collected were unlawful under the Public Service Company Law.

If the reparation order is the basis of a cause of action or is *prima facie* evidence of the unlawfulness of the charges collected and of the right of the defendant-in-error to recover it is only because of the provisions of the Public Service Company Law of Pennsylvania. The right of the defendant-in-error to recover depends, therefore, entirely upon the validity of the reparation order and also upon the validity of the Public Service Company Law making the reparation order *prima facie* evidence and giving to the defendant-in-error a cause of action for its enforcement.

If the reparation order of the State Commission was a statute of or an authority exercised under the State within the meaning of Section 237 of the Judicial Code and its validity was drawn in question on the ground of its being repugnant to Section 208 (a) of the Transportation Act,

1920, or if the validity of the Public Service Company Law was drawn in question on the same ground, then a perfect case for review on writ of error under Section 237 of the Judicial Code is here presented; for the State Court, having held that the defendant-in-error is entitled to recover, has thereby rendered a decision in favor of the validity of the order and of the State statute.

1. THE REPARATION ORDER OF THE PUBLIC SERVICE COMMISSION WAS A STATUTE OF OR AN AUTHORITY EXERCISED UNDER A STATE WITHIN THE MEANING OF SECTION 237 OF THE JUDICIAL CODE.

That an order of a State administrative tribunal is a statute of or an authority exercised under a State within the meaning of Section 237 of the Judicial Code is apparent from the cases in which this Court has held that a decision of a State Court sustaining such an order as valid may be reviewed here on writ of error.

Ohio Valley Co. v. *Ben Avon Borough*, 253, U. S. 287;

Pennsylvania R. R. Co. v. *Public Service Comm.*, 250 U. S. 566;

Lake Erie & W. R. R. Co. v. *Public Utility Comm.*, 249 U. S. 422;

Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134.

The state commissions' orders in these cases were, it is true, orders directing some future action or prescribing rates for the future but we believe that it can not successfully be urged that a different conclusion is required in the case at bar merely because the order of the State Commission here sued upon was a reparation order rather than an order prescribing rates to be thereafter charged.

Whatever may be the character of a reparation order in other circumstances we submit that when the situation here presented is considered and the purposes of the Transportation Act, 1920, are borne in mind it must be held that a decision as to the validity of this reparation order may as properly be reviewed on writ of error as a decision with respect to the validity of an order fixing rates for the future.

In the second portion of this brief in discussing the merits of the case we have dealt at some length with the character of the reparation order here under consideration (see pp. 77-84), and reference is made to what is there said in support of the present point.

The complaint to the Public Service Commission in *Docket No. 3206* was filed in February, 1920. Had the decision on that complaint been announced at once and had the State Commission in March, 1920, found that the rate of $1.10 was unreasonable and that the rate to be thereafter charged should be only $1.00 and had it at that time made an order requiring the plaintiffs-in-error immediately to establish the rate of $1.00 it cannot be doubted on the authority of the cases just cited that a decision of the State Court sustaining this order as valid would be reviewable here on writ of error.

As a matter of fact, however, the State Commission did not decide *Docket No. 3206* until August, 1921, and therefore could not deal with the rates for the period from March 1 to September 1, 1920, by an order prescribing rates for the future. In the reparation proceedings, *Docket No. 4738*, it attempted to do the only thing which it could do to accomplish the same result, namely, award reparation to the basis of the $1.00 rate. In other words, the State Commission's order in *Docket No. 4738* here sued

upon is an order seeking to put the parties in the position which they would have been in had the Commission disposed of the case in time to fix the rates for the Guaranty Period by an order for the future. It follows, as we have argued hereafter, that the reparation order is in substance an order reducing rates and we therefore submit that the decision of the State Court sustaining its validity, if its validity was drawn in question, is reviewable here on writ of error as would be an order prescribing rates for the future.

2. THE VALIDITY OF THE REPARATION ORDER OF THE PUBLIC SERVICE COMMISSION IN *DOCKET NO. 4738* WAS DRAWN IN QUESTION ON THE GROUND OF ITS REPUGNANCE TO SECTION 208(a) OF THE TRANSPORTATION ACT, 1920.

In their affidavits of defense to the statement of claim of the plaintiff below, the defendant-in-error here, the plaintiffs-in-error denied the validity of the order of the Public Service Commission of June 20, 1922, in *Docket No. 4738* upon which this suit is based (R. 25, 26, 36). This contention proceeded upon the grounds (1) that the rate charged was a lawful rate under the provisions of Section 208(a) of the Transportation Act, 1920, and therefore was not unlawful in violation of the Public Service Company Law; (2) that therefore the order of the Public Service Commission based upon the theory that the rate was unlawful in violation of the Public Service Company Law was void, and (3) that the order would accomplish a reduction in the rates for the Guaranty Period below the level of the rates in effect at the termination of Federal control, without the approval of the Interstate Commerce Commission as required by Section 208(a) of the Transportation Act, 1920, (R. 22-36).

3. THE VALIDITY OF THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA WAS DRAWN IN QUESTION ON THE GROUND THAT IT WAS IN CONFLICT WITH SECTION 208(a) OF THE TRANSPORTATION ACT, 1920.

The plaintiffs-in-error have asserted that so far as the shipments involved in this suit were concerned, the Public Service Company Law was superseded by the Transportation Act, 1920; that the rates charged were lawful under that Act; that therefore the defendant-in-error was without a cause of action under the Public Service Company Law to enforce the order of the State Commission, and that in so far as the State Law might be claimed to render the rates collected unlawful and to make the reparation order in *Docket No. 4738 prima facie* evidence and give a cause of action, it was superseded by the Transportation Act, 1920, and was therefore inoperative and invalid.

It is not necessary that the validity of the State statute in its entirety be attacked. It is sufficient to support a writ of error if the validity is challenged in so far as it is claimed to be applicable to this case, *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282.

In *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, this Court, on writ of error, reviewed and reversed a decision of a state court sustaining the allowance of a writ of mandamus requiring a railroad to charge no higher rates than those fixed by State law. The writ of error was sought on the ground that the State law had been superseded by the order of the Director General of Railroads prescribing intrastate rates pursuant to authority conferred by the Federal Control Act (Act of Congress, March 21, 1918, 40 Stat. L. 451) and the rates charged were those established under that order. In the case at bar the rates charged were likewise established under the same order of the Director General pursuant to the Federal Control

Act. The Transportation Act, 1920, whose provisions are relied upon, was an act relating to the return of the railroads to their owners, as the Federal Control Act provided for their taking over by the Government. The situation presented in the case at bar is in all respects similar to that considered in the *North Dakota Case, supra,* and it is submitted that if a writ of error was proper there it is equally so here.

B. THE FACT THAT THE STATE COURT DECIDED THAT UNDER THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA THE DEFENDANT-IN-ERROR WAS ENTITLED TO RECOVER BECAUSE OF THE FAILURE OF THE PLAINTIFFS-IN-ERROR TO APPEAL FROM THE DECISION OF THE STATE COMMISSION IN *DOCKET NO. 3206* DOES NOT WARRANT THE DISMISSAL OF THE WRIT OF ERROR.

This suit was originally contested by the carriers not only because of their belief that there was here no enforcible cause of action, but also in order to obtain an adjudication of the question of the power of the State authorities to enforce retroactive reductions of intrastate rates collected on shipments moving during the Guaranty Period which would afford a precedent for the disposition of numerous claims of this character pending in the various States, proceedings in which have been held in suspense pending a final decision by this Court in the present case. It would be regrettable, therefore, if a decision of the principal issue by this Court in the present case should be prevented by the dismissal of the writ of error or a denial of the writ of certiorari for the reasons which have been urged therefor by the defendant-in-error. We believe, however, that these reasons are unsound and that a dismissal of the writ of error or denial of the writ of certiorari is not warranted and that this Court should render a decision upon the principal issue.

In order to understand the theory upon which the dismissal of the writ of error is sought a brief reference to the history of the proceedings leading up to the present suit is necessary.

The rate of $1.10 was in effect on February 29, 1920, and continued to be charged thereafter. The complaint in *Docket No. 3206* alleging that this rate would be unlawful in violation of the Public Service Company Law after March 1, 1920, was filed shortly prior to that date and hearing on this complaint was had early in March of 1920. The railroads then contended that the evidence failed to show that the rate was unjust or unreasonable. They did not deny the jurisdiction of the State Commission to consider the reasonableness of this rate for the period after March 1, 1920, including the Guaranty Period. On the contrary they expressly admitted that the State Commission had authority to enter upon the inquiry and render a *decision* as to the reasonableness of the rates. But they did contend that in view of the Section 208(a) of the Transportation Act, 1920, no *order* of the State Commission requiring a reduction from the rate of $1.10 could be enforced prior to September 1, 1920, without the Interstate Commerce Commission's approval.

Prior to September 1, 1920, neither a decision nor an order was made by the State Commission. Its decision was not announced until nearly a year later. In August, 1921, came its decision that the rate of $1.10 had been unreasonable during the Guaranty Period and that the rate of $1.54 which had been made effective before its decision was announced would be unreasoanble for the future to the extent that it exceeded $1.40.

We submit that there is a very sound distinction between a *decision* or a determination that a rate is unreasonable and an *order* requiring a certain rate to be made

effective. The latter enforces a reduction, the former does not. This distinction the State Court seems not to have recognized and this may in part explain its decision. The distinction is not merely one of words but finds proof in the fact that there is no provision of the Public Service Company Law of Pennsylvania which renders a public utility guilty of a violation of the statute and subjects it to penalties for continuing to collect a rate merely because a decision has been announced that the rate is unreasonable. The utility is subject to penalty only if it fails to comply with an *order* requiring it to establish a certain rate or to do some other specific act, and is not subject to penalty if it collects the rates contained in its tariffs, even if these are held to be unreasonable by the State Commission (Public Service Company Law, Art. VI, Section 41, P. L. 1432). The distinction, we believe, is similar to that between a decision of a Court of Equity and a decree issued pursuant thereto. Until the decree has been made no proceedings for contempt for a violation merely of the decision can be brought.

When it announced its decision in *Docket No. 3206* the only order which the State Commission made was an order fixing rates to be charged after August, 1921 (R. 12-15). It made no requirement as to what the carriers should do with respect to the charges which had been collected during the Guaranty Period. In fact, it definitely stated that no order as to these charges would be made until a later proceeding. It is obvious that since the charges had already been collected the only order which could have given effect to the Commission's determination as to the reasonableness of the rates during the Guaranty Period would have been a reparation order. No reparation order was made until the subsequent proceeding in *Docket No. 4738* (R. 19).

The portion of the Public Service Company Law which,

according to the Court below, gave the defendant-in-error a cause of action because of the failure of the plaintiffs-in-error to appeal from the State Commission's decision in *Docket No. 3206* is found in Article VI, Section 31, of the Public Service Company Law (P. L. 1429) which is in part as follows:

> "Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

The provisions for "an appeal or proceeding taken as provided in this act" are found in Article VI, Section 17, as amended June 3, 1915 (P. L. 779), the pertinent portion of which reads:

> "Section 17. Within thirty days after filing of any finding or determination by the Commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court; Provided, that *there shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided.*" (Italics ours.)

The reference contained in the proviso just quoted to a suit on an order for reparation is to Article V, Section 5 (P. L. 1405) which provides:

> "If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named

> therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be *prima facie* evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received."

It must be borne in mind that the plaintiffs-in-error made no objection to the orders of the State Commission prescribing rates to be charged after August, 1921, but promptly complied therewith. They did not therefore seek to review the action of the State Commission in *Docket No. 3206* as to such rates. This the lower Court appears not to have understood, as we will later more fully point out.

Under these circumstances the carriers believed that a mere decision that the rates charged during the Guaranty Period had been unreasonable, unaccompanied by any *order* seeking to give effect thereto, did not affect the rights of the parties and that a sufficient opportunity to contest a reparation award would be afforded if and when an order for the payment of reparation might be made. They considered the provisions of the State law above quoted as theretofore construed by the State Courts, to mean that the proper method of testing a reparation order was by defense to a suit for its enforcement. Hence the carriers took no appeal from the action of the State Commission in *Docket No. 3206*.

Thereafter the defendant-in-error filed its complaint in *Docket No. 4738* seeking reparation and after a hearing the reparation order was issued. Payment of the reparation order was refused by the railroads in order that the ques-

tion of the enforcibility of the order might be adjudicated. Thereupon this suit was brought.

The very fact that defendant-in-error was compelled to file a new complaint in *Docket No. 4738* in order to recover reparation and that the Public Service Commission did not award reparation or make a finding with reference thereto until after further hearings on this new complaint shows that in *Docket No. 3206* the Commission did nothing final or effective; nothing, in short, which could be made the basis of an appeal.

On these facts, we submit that no ground for dismissing the writ of error exists merely because it is claimed that the State Court has held that under the Public Service Company Law the defendant-in-error is entitled to recover on account of the failure of the railroads to appeal from the Commission's decision in *Docket No. 3206.*

1. THIS IS NOT A DECISION ON AN INDEPENDENT STATE GROUND SUFFICIENT TO SUSTAIN THE JUDGMENT SINCE THE FEDERAL ISSUE GOES TO THE ENTIRE CASE.

This Court has held that although a State Court purports to rest its judgment upon an independent matter of State law its decision may be reviewed here on writ of error, provided the federal question which is raised goes to the entire case. In *West Chicago R. R.* v. *Chicago,* 201 U. S. 506, Mr. Justice Harlan in delivering the opinion of this Court, said at pages 519, 520:

> "1. The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation—although the opinion of the state

> court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting the State from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for, the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them."

It has been held that this is so even where the State Court fails to discuss the federal question at all. *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, 432. *Harding* v. *Illinois*, 196 U. S. 78. In *Chicago, B. & Q. R. R.* v. *Drainage Commrs.*, 200 U. S. 561, 580, this Court again speaking through Mr. Justice Harlan said:

> "Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however, the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But *it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.*" (Italics ours.)

It is submitted that in the case at bar the federal issue goes to the entire case and that even the State Court's conclusion that the defendant-in-error is entitled to recover because of the failure of the carriers to appeal from the State Commission's decision in *Docket No. 3206* was a determination of this federal issue.

Assuming for the sake of argument that the State Court correctly understood the facts and the issues of the case (which we claim it did not) to which it purported to apply the provisions of the State Law, and that the issues raised by the affidavits of defense were, as the State Court seems to have believed, submitted to and decided by the State Commission in *Docket No. 3206,* we submit that nevertheless, the State Court could not escape a determination of the federal question.

The plaintiffs-in-error by their affidavits of defense asserted that no reduction therein having been approved by the Interstate Commerce Commission the rates in question were lawful under Section 208(a) of the Transportation Act, 1920; that since they were the rates which the railroads were required by this federal statute to collect the charging of these rates could not constitute a violation of the Public Service Company Law; that the provisions of that law were therefore inapplicable to the situation and invalid; that the reparation order of the State Commission in *Docket No. 4738* was null and void, and that a State statute which would make such an order *prima facie* evidence of the facts stated must be likewise invalid.

Under these circumstances since the only ground for the State Court's decision with respect to the failure to appeal in *Docket No. 3206* is to be found in the provisions of the State Public Service Company Law itself, and not

in some general procedural statute, its determination that the defendant-in-error was entitled to recover thereunder necessarily involved a determination that the provisions of the State Public Service Company Law were controlling regardless of the federal statute and therefore was a determination of the federal issue.

2. THE STATE COURT EXPRESSLY DECIDED THE FEDERAL QUESTION AND IT CAN NOT BE SAID THAT ITS JUDGMENT WAS NOT BASED UPON THIS DECISION.

In *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 348, it was urged in support of a motion to dismiss the writ of error that the federal question sought to be raised, a question under the Federal Employer's Liability Act, had not been properly raised in the Trial Court in accordance with the local procedural statute. The State Court, however, had passed upon the question and this Court therefore held that the writ of error should not be dismissed but that it would itself review the State Court's decision on the federal question.

In the case at bar the State Court discussed at length and rendered a decision on the federal question sought to be raised by the affidavits of defense. This is agreed by defendant-in-error. The following portions of the Court's opinion clearly indicate this fact (R. 93):

> "In 1922, the Public Service Commission was asked to grant reparation to the appellees for the sums paid in excess of the dollar rate for the period from March 1, 1920 to August 26 of the same year, and $1.40 thereafter, and to award a sum which would equal the overcharges, and this resulted in an allowance to the petitioners. The sum claimed for the excess collection, during the so-called guarantee period mentioned, forms the foundation of the pres-

ent suit. A statement of claim was filed, and an affidavit of defense interposed, which the learned Court below held to be insufficient, with the result that judgment was entered for the plaintiff.

As noted, the defense rests on the proposition that the rate fixed as reasonable by the Public Service Commission of the State is ineffective, in that no approval of the Interstate Commission was secured to reduce rates during the guaranty period, and it is insisted such action was required under the terms of the Transportation Act. This overlooks the provision of the Congressional legislation that no changes shall be made unless approved 'by *State* or Federal authority.' It is clear that the local rates were held in abeyance during the period of federal control, and, as far as interstate commerce is concerned, remained subject to the action of the Interstate Commerce Commission until September 1, 1920, but after March 1st of that year, insofar as intrastate rates were concerned, the control of the State Commission again became effective: *L. & N. E. R. R. Co.* v. *Pub. Ser. Comm.*, 277 Pa. 493; see, *L. & N. E. R. R. Co.* v. *Pub. Serv. Comm.*, 79 Pa. Superior Ct. 540. As said by Judge Kephart in the decision first cited: 'After the Act of 1920 the control of the Interstate Commerce Commission was (1) to establish a level of rates which would afford the compensation necessary to permit the maintenance of an adequate national railway system during the prescribed period; (2) remove discrimination against interstate commerce as a whole arising from the enforcement by State authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic aimed at persons or localities by any intrastate rate or schedule.'

Prior to the Transportation Act and the taking over of the railroads by the Government, it is clear the Interstate Commerce Commission had no control over matters affecting intrastate transportation, including the rates charged by such carriers, except

as their enforcement caused discrimination against interstate commerce: *R. R. Com. of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *U. S.*, 257 U. S. 591; *Texas* v. *Eastern Texas R. R.*, 258 U. S. 204. Here, admittedly, the shipments are of the former class alone, and do not affect the movement of freight from one state to another. During the war, the Federal Government controlled both classes, but beginning with March 1, 1920, the Federal rights were limited, and, as already noted, the determination of reasonableness of charges was either within the jurisdiction of the 'State or Federal authority,' depending on the character of the traffic, and other effective limitations of the Transportation Act'' (281 Pa. 267).

The State Court having decided the federal question, whatever other conclusions it may have expressed, we submit that its decision is properly reviewable here. This is the more so when the State Court's report is read in full, for such a reading will disclose how impossible it is to determine the exact grounds upon which the State Court's judgment was based.

3. THE CIRCUMSTANCES OF THIS CASE ARE SUCH THAT THIS COURT SHOULD ITSELF REVIEW THE RECORD TO ASCERTAIN WHETHER THE FEDERAL QUESTION SOUGHT TO BE RAISED BY THEIR AFFIDAVITS OF DEFENSE WAS WAIVED BY THE FAILURE OF THE PLAINTIFFS-IN-ERROR TO APPEAL FROM THE DECISION OF THE PUBLIC SERVICE COMMISSION OF PENNSYLVANIA IN *DOCKET NO. 3206* AND SHOULD HOLD THAT SUCH FAILURE TO APPEAL DID NOT CONSTITUTE A WAIVER OF THE DEFENSE UNDER THE FEDERAL STATUTE AND THAT THE STATE COURT'S DECISION TO THE CONTRARY WAS SO CLEARLY ERRONEOUS AS NOT TO BE CONCLUSIVE UPON THIS COURT.

(a) Whether or not the federal issue has been waived is itself a federal question as to which this Court is not bound by the decision of the State Court, but should itself review the record to ascertain whether such was the fact. And even if the State Court's decision purports to be based in part on an independent state ground this Court is not concluded thereby if such decision was based upon a mistaken understanding of the facts or of the federal issues sought to be raised, or was so clearly erroneous as to be arbitrary.

In *Carter* v. *Texas*, 177 U. S. 442, at page 447, this Court said:

> "But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State. *Neal* v. *Delaware*, 103 U. S. 370, 396, 397; *Mitchell* v. *Clark*, 110 U. S. 633, 645; *Boyd* v. *Thayer*, 143 U. S. 135, 180."

In the present case the Court below gave judgment for the defendant-in-error on the ground that the affidavits of defense were insufficient. In *Mitchell* v. *Clark*, 110 U. S. 633, at page 645, Mr. Justice Miller said:

> "3. The question whether a plea sets up a sufficient defence, when the defence relied on arises under an act of Congress, does present, and that necessarily, a question of federal law; for the ques-

> tion is and must be, does the plea state facts which under the act of Congress constitute a good defence?"

The State Court held that the defense under a federal statute had been waived by the conduct of the plaintiffs-in-error. This Court has held that when a State Court has decided that a party was estopped to assert a defense relied upon under the Federal Constitution or under a federal statute it will itself review the record to ascertain the correctness of the decision. *Union Pacific R. R. Co.* v. *Public Service Comm.*, 248 U. S. 67. In that case Mr. Justice Holmes, delivering the opinion of the Court at page 69 thereof, said:

> "The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. *Creswill* v. *Knights of Pythias*, 225 U. S. 246."

In *Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, Mr. Justice Van Devanter, speaking for the Court, said (p. 164):

> "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See *Moran* v. *Horsky*, 178 U. S.

205, 208; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe* v. *Thomas,* 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend, Ibid.,* 359, 367."

Of special interest in connection with the case at bar is the recent decision of this Court in the case of *First National Bank* v. *Anderson,* decided January 4, 1926, 46 S. Ct. 135. That case was a suit to restrain the collection of State taxes on the ground that the tax law discriminated between bank stock and moneyed capital invested in competition therewith in violation of the federal statute. The State Court having sustained the tax the case came before this Court on writ of error. In the course of the opinion of the Court Mr. Justice Van Devanter said:

"By a motion to dismiss the jurisdiction of this Court on the writ of error is challenged on the grounds, first, that the State Court rested its judgment on the construction and sufficiency of the allegation of the petition and its decision of that question is conclusive here; and, secondly, that the judgment is right independently of any ruling on the asserted federal question, in that the suit is not one in which relief may be had in equity because (a) an adequate remedy at law may be had under the local law by paying the tax and suing to recover the money, (b) *the bank has not exercised the local statutory right of appealing from the action of the county officers imposing the tax,* and (c) there has been no payment or tender of so much of the taxes as would be due if the five mills levy were applied to the shares.

Plainly the first ground cannot be maintained. Whether a pleading sets up a sufficient right of ac-

> tion or defense grounded on the Constitution or a law of the United States is necessarily a question of federal law, and, where a case coming from a State Court presents that question, this Court must determine for itself the sufficiency of the allegation displaying the right or defense and is not concluded by the view taken of them by the State Court (citing cases).
>
> The second ground is not better."

Finally, in no case that we have been able to find has this Court held itself concluded by a decision of a State Court, even on a supposedly independent state ground, where it appeared that the State Court misunderstood the facts in the case and the nature of the federal issues raised and where its decision on the state ground was the result of such misunderstanding.

(b) The defense under Section 208(a) of the Transportation Act, 1920, was asserted at the earliest possible moment in this suit.

It has been held by this Court that the proper manner and time to raise a federal issue is upon the pleadings in the Trial Court. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291. The plaintiffs-in-error asserted their contentions in their affidavits of defense to the statement of claim in the Trial Court in the present suit. Under the Public Service Company Law of Pennsylvania this was the first opportunity which existed for the plaintiffs-in-error to object to the decision and reparation order in *Docket No. 4738,* the Public Service Company Law expressly prohibiting an appeal directly from an order or a decision of the State Commission with respect to reparation and providing for objection thereto only in a suit brought for its enforcement.

It was not said by the Pennsylvania Court that the defense was asserted too tardily in the present suit, but that the defense had been waived because no appeal had been taken from a decision of the Public Service Commission in a different and earlier case than that in which the order here in suit was made. We know of no decisions of this Court which have gone so far as to hold that a defense under a federal statute has been waived under these circumstances.

(c) The decision of the State Court was based upon an erroneous understanding of the facts and the issues in that the State Court considered that the issues raised related to the State Commission's decision and order fixing a rate of $1.40 and not, as was the fact, to the reparation order requiring a reduction in the rate of $1.10 charged during the Guaranty Period.

Three times the plaintiffs-in-error sought a reargument before the Court below, not alone to urge their legal contentions relied upon, but also to point out errors in the Court's understanding of the facts. In spite of these efforts the decision reflects several serious errors as to facts which appear material to the decision.

The language of the State Court's opinion indicates that the issue which it understood to be involved in this case related to the order of the State Commission in *Docket No. 3206* fixing the rate of $1.40 to be charged after August, 1921. Thus it said (R. 91):

> "From the *order* fixing the reasonable rate no such appeal was taken, and the appellants are now debarred from complaining of the ruling" (281 Pa. 264). (Italics ours.)

As has already been pointed out, the only *order* made in *Docket No. 3206* was the order fixing the rate of $1.40 to be charged after August, 1921.

That the Court had this order in mind is indicated by the following further language of the opinion; quoting from the report of the Commission in *Docket No. 3206* relating to the $1.40 rate:

> "'* * * Respondents will be directed, by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of *$1.40,' being the rate here complained of.* This order was made without any qualification and, as indicated, without any suggestions of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal" (R. 93) (281 Pa. 267). (Italics ours.)

Of course, the rate of $1.40 is not the rate complained of here nor is it the rate which was charged during the Guaranty Period. It is the rate prescribed by the State Commission to be charged after August, 1921. Admittedly the order prescribing this rate was made without qualification, was final and was the subject of appeal, but the railroads did not object to the order and did not seek an appeal to obtain adjudication of the power of the State Commission to enforce it.

Therefore, we submit that a decision of the State Court that the failure of the plaintiffs-in-error to appeal from the decision and order of the State Commission was a waiver of the defense asserted in this suit, is not to be accepted as final by this Court when it appears that the Court's decision was made on the theory that the defense sought to put in issue the legality of the order fixing the rate of $1.40 when such is far from the fact and when this case involves only the rate of $1.10 as to which the Commission made no order in *Docket No. 3206.*

(d) The failure to appeal from the decision of the State Commission in Docket No. 3206 could constitute a waiver of the defense relied upon only if the issues raised by this defense were there decided by the Commission and subject to review. The decision of the State Court was therefore erroneous since it was based upon the erroneous impression of the facts that the issues raised by the affidavits of defense were submitted to and decided by the State Commission in Docket No. 3206 when such was not, and in the nature of things could not have been the fact.

It is self-evident that unless an adjudication of the federal issues could have been had on an appeal from the decision in *Docket No. 3206* the failure to take such an appeal could not constitute a waiver of a claim to have the question adjudicated in a later proceeding and therefore could not be a waiver of the defense relied upon which seeks this result. It is equally obvious that unless these issues had been submitted to and decided by the State Commission in *Docket No. 3206,* an appeal to review the Commission's decision in that case would not have presented the issues for adjudication.

This indeed seems to have been the view of the Court below and its conclusion, judging from its opinion, seems to rest upon its impression that the issues raised by the affidavits of defense were submitted to and decided by the Commission in *Docket No. 3206* and were of such a character that they could have been properly adjudicated upon appeal from this decision. This is indicated by the following language from the Court's opinion:

> "Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, a different proposition might be before us. But that the contrary was considered and decided in Complaint No. 3206, and squarely passed upon by the Commission, is evidence not only from the record in that proceeding,

but from the opinion in the reparation proceedings now before the Court. It was only after our decision in *L. & N. E. R. R. Co.* v. *Pub. Ser. Com.*, 277 Pa. 493, that a change of attitude by the defendants took place" (R. 92) (281 Pa. 265).

With all due respect for the Court below, we submit that its view of the facts was entirely erroneous and that its statement as to the attitude of the carriers was wholly unwarranted. However, the circumstance that the Court below predicated its decision upon this view of the facts indicates clearly that the question whether the plaintiffs-in-error waived their defense depends largely upon the facts as to the character of the defense and the issues submitted to the Commission in *Docket No. 3206* rather than upon an interpretation of the provisions of the Public Service Company Law. Certainly this Court is not bound by the view of the facts adopted by the Court below but will itself review the record to see whether the Court below correctly understood the facts of record which it held to indicate a waiver of the defense now asserted.

The substance of the defense here asserted under the federal statute is that the rates collected were lawful because no *reduction* therein had been approved by the Interstate Commerce Commission. Whether this federal issue was submitted to and decided by the State Commission depends at least in part upon what was meant by the words "no rate shall be *reduced*" as used in Section 208(a) of the Transportation Act, 1920.

We submit that a rate is not *reduced* by a mere declaration that it is or was too high. To reduce a rate, a lower rate must be *made effective*. So far as shipments during the Guaranty Period were concerned a lower rate could be made effective only by paying reparation.

Any action by the State Commission would therefore conflict with Section 208(a) only if it amounted to a decision that the payment of reparation could be enforced without the Interstate Commerce Commission's approval. Unless this was what the Commission decided in *Docket No. 3206* it did not decide the federal issue here raised and the State Court's impression that it did decide this issue was erroneous.

In determining whether this issue was decided by the State Commission, the Commission's decision must be read in the light of the issues submitted to it by the parties.

It must be remembered that the complaint in *Docket No. 3206* was filed prior to the termination of Federal control, that the hearings were had shortly thereafter, and that the case was submitted to the State Commission for determination when the Guaranty Period had only just commenced. As the case was submitted, therefore, the parties contemplated that the Commission's decision might be announced during the Guaranty Period and that the Commission might at that time make an order prescribing rates to become effective during the Guaranty Period. The contentions which were advanced were necessarily made with this in view. It would be surprising therefore if the parties had submitted to the State Commission for determination the question whether a reparation order if issued long after the termination of the Guaranty Period would support a cause of action in the courts under the Public Service Company Law without the approval by the Interstate Commerce Commission of a reduction in the rates.

At the argument before the State Court the following was read to the Court from the brief of the carriers, dated June 1, 1920, in *Docket No. 3206* setting forth the position taken by them in that proceeding:

> "The conclusion to which our reasoning leads and which, we submit, is that to which the Commission must adhere, is that Section 208(a) of the Transportation Act applies to intrastate rates and that it is constitutional. The necessary result is that all rates continued in effect pursuant thereto are lawful, but that this Commission has jurisdiction to consider this $1.10 rate to determine whether or not it is now reasonable. It may not order it reduced solely because it exceeds the rate fixed by this Commission in its order of December 10, 1917, but may do so, only after a finding based upon proper and conclusive evidence in this case, that the rate is unreasonably high. And even then its order for reduction must be approved by the Interstate Commerce Commission if it is to take effect prior to September 1, 1920."

From the foregoing it will be plainly seen that the carriers in submitting their contentions to the State Commission made a sharp distinction between the jurisdiction of the Commission to express an opinion on the reasonableness of a rate and its jurisdiction to enforce such an opinion by an order making effective a reduction. The former was admitted. The latter was denied without the Interstate Commerce Commission's approval.

We submit that as to the shipments during the Guaranty Period all that the Commission did in *Docket No. 3206* was to express an opinion on the reasonableness of the rate. That as to which its jurisdiction was challenged, the enforcement of a reparation order seeking to make effective a reduction in rates during the Guaranty Period, it did not do. Therefore we submit that its action cannot be taken as a decision that it had the power to do so. We believe further that no intent to render such a decision can be found in the Commission's report.

The report of the State Commission in *Docket No. 3206* which is in the record (R. 7-12) speaks for itself. We respectfully submit that nothing in that report will be found to indicate that the State Commission considered that it had before it the question which is the only question here in issue; namely, whether the approval of the Interstate Commerce Commission to a reduction in rates during the Guaranty Period would be necessary before an action to enforce a reparation order of the State Commission could be maintained under the Public Service Company Law. The State Commission did not even decide that the defendant-in-error was entitled to a reparation order but reserved consideration of this matter for a subsequent proceeding.

The most that the Commission can be said to have done in *Docket No. 3206* with respect to reparation was to announce that it would entertain a petition later to be filed for an award of reparation accompanied by "supporting data." What might thereafter happen was a matter of speculation only. In spite of the Commission's invitation the defendant-in-error might not have sought reparation or it might have failed to prove its damage or, as has been suggested, the Interstate Commerce Commission might have given its approval to a reduction in the rates. How can it be contended that the State Commission anticipated all of these possibilities?

The State Commission plainly considered that the inquiry into defendant-in-error's right to reparation would be a separate proceeding. And indeed when the petition for reparation was later filed the Commission gave the proceeding a new docket number and made a separate record. To support its claims the defendant-in-error had to prove that it had paid the freight charges as alleged and that it had suffered damage thereby. This it had not done in *Docket No. 3206,* and the Commission in that proceeding had made

no findings on these facts essential to a reparation award. Assuming, however, that the State Commission could be said to have decided in *Docket No. 3206* that a reparation order should be issued, there is certainly nothing in its report to indicate that it concluded that such an order could be enforced by a suit under Article V of the Public Service Company Law prior to an approval of the order or of a reduction in rates by the Interstate Commerce Commission.

In the face of this we submit that the impression of the State Court was entirely unjustified that the plaintiffs-in-error had submitted to the State Commission in *Docket No. 3206* the issues which are raised by their affidavits of defense in this suit or that these issues were decided by the Commission.

If the issue was not submitted and decided by the State Commission in *Docket No. 3206* obviously the contentions of the plaintiffs-in-error with respect thereto were not waived by their failure to appeal from that decision.

And since the State Court's decision was predicated upon an erroneous understanding of one of the fundamental facts of the case, namely, what was submitted to and decided by the State Commission in *Docket No. 3206,* we submit that the decision is not conclusive upon this court.

(e) The failure to appeal from the decision of the State Commission in Docket No. 3206 could constitute a waiver of the defense relied upon only if such an appeal could have presented the issues raised by the defense for adjudication. The State Court's decision that the defense had been waived was clearly erroneous since such an appeal would have been premature and could not properly have presented the issues for adjudication.

This is a suit to recover reparation. The action lies,

if at all, only because the State Commission has made the reparation order in favor of the defendant-in-error and the issue here is the enforcibility of such order. At the time when under the State statute an appeal could have been taken from the Commission's decision in *Docket No. 3206* no reparation order had been made by the Commission. The Commission had not determined that in its opinion the defendant-in-error was entitled to reparation. It was awaiting a petition with supporting data and proof of damage. Such a petition might never have been filed or the necessary proof of damage might not have been made. How can it be said therefore that if such an appeal had been taken it would have presented for adjudication the question whether a cause of action such as that here could be maintained?

More than this, the essential fact in support of the defense under Section 208(a) of the Transportation Act, 1920, is the lack of approval by the Interstate Commerce Commission of a reduction in the rate for the Guaranty Period. It was possible that following the decision in *Docket No. 3206* and prior to the issuance of a reparation order or prior to a suit for its enforcement the approval by the Interstate Commerce Commission of the reduction might have been sought and obtained. Had this been done the defense now relied upon could not be asserted. In other words, this defense depends upon the situation actually existing at the time proceedings were taken in this suit to give effect to the reparation order accomplishing the reduction.

We submit that an appeal taken in 1921 would have been premature to obtain an adjudication of an issue dependent entirely upon the facts existing at a later time when a suit might be brought to enforce a reparation order subsequently issued.

If an appeal could not present the issue for adjudication the failure to take an appeal obviously could not constitute a waiver of the contentions with respect thereto. And therefore the State Court's decision that the defense was waived is plainly erroneous and should not be held by this Court to deprive it of jurisdiction.

(1) The action of the plaintiffs-in-error in not appealing from the State Commission's decision in Docket No. 3206 was in accordance with the provisions of the Public Service Company Law as interpreted by the State Courts in previous decisions with which the decision in the case at bar is so plainly in conflict as to be arbitrary.

We submit that in taking no appeal from the Commission's decision in *Docket No. 3206* but awaiting the issuance of a reparation order, and then defending suit to enforce this order, the plaintiffs-in-error were acting strictly in accordance with the requirements of the State Public Service Company Law as construed by the courts of the State and that the State Court should not be permitted by a sudden reversal of its own decision to deprive the plaintiffs-in-error of their defenses under a federal statute.

In considering the pertinent portions of the State statute and the State Court's decision with reference thereto it is again important to bear in mind that as the shipments, the charges on which are involved in this suit, had been transported nearly a year before the Commission's decision in *Docket No. 3206* had been announced, and as at the time the transportation had been performed the charges had all been paid on the basis of the rate in effect on February 29, 1920, the only bearing which the decision of the Commission in *Docket No. 3206* could have had on such shipments was with respect to reparation, *i. e.*, a refund of a portion of the freight charges paid. It must also be remembered that, while the Commission in *Docket No. 3206* decided that

the rates paid were unreasonable it made no reparation order but expressly withheld action on the question of reparation for a subsequent proceeding.

Since there was no duty to pay reparation until the issuance of a reparation order and since in fact the payment of such reparation would probably have been unlawful until a finding by the State Commission that the party claiming reparation was entitled thereto and until the issuance of an order in its favor, the plaintiffs-in-error conceived that in view of the statutory provisions just quoted the only procedure for them to adopt was to await the issuance of a reparation order and then to contest a suit brought thereon for its enforcement. That this was the proper course had been indicated by several decisions of the state courts.

The State Commission's decision in *Docket No. 3206* was announced in August, 1921. A year before that time in *Newport & S. V. RR. Co.* v. *Public Service Comm.*, 75 Pa. Superior Ct. 28, the Superior Court of the State had held that an appeal would not lie to review a decision of the State Commission that rates collected in the past had been unreasonable and that the plaintiff was entitled to reparation. The Court in its opinion said at page 31:

> "Section 5, article V, of the statute, provides that on failure to comply with an order for reparation '* * * the person named therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be prima facie evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit * * *.' See *New York and Pennsylvania Co.* v. *New York Central R. R. Co.*, 267 Pa. 64.
>
> "As the statute prohibits an appeal from an order

for reparation and provides for its enforcement by suit in the common pleas, and as we cannot anticipate questions that may arise in such suit, if brought, we must refrain from discussing the merits now."

In April, 1920, the Supreme Court of the State in *New York & Pennsylvania Co.* v. *N. Y. C. RR. Co.*, 267 Pa. 64, had clearly held that under the provisions of the Public Service Company Law a proceeding for reparation was to be separate from a proceeding in which the Commission was asked to determine merely the question of the reasonableness of rates.

The views of the plaintiffs-in-error with respect to the requirements of the State law were further confirmed by decisions of the state courts in another case with which the decision of the Supreme Court of the State in the case at bar appears to be wholly irreconcilable.

In *Lehigh & New England R. R. Co.* v. *Public Service Commission*, 79 Pa. Superior Ct., 540, affirmed in 277 Pa. 493, there was before the Pennsylvania courts an appeal taken from a decision of the Public Service Commission under circumstances practically identical with those which would have been before the Court had the plaintiffs-in-error here appealed directly from the Commission's decision in *Docket No. 3206*. The State Commission had considered a complaint against the Lehigh & New England Railroad Company alleging that certain intrastate rates on coal maintained by this railroad were and had been unreasonable. The complaint prayed the establishment of rates for the future and also an award of reparation on shipments moving in the past. Although the complaint was filed during the Guaranty Period the decision of the Commission, like that in *Docket No. 3206*, was not announced until a year after the Guaranty Period had expired. The Commission de-

cided that the rates charged had been unreasonable, made an order directing the railroad to file a tariff providing for the future the rate found by it to be reasonable, and as to the shipments which had moved in the past did as it did in *Docket No. 3206,* announced that it retained "jurisdiction of the case in the matter of reparation." As the railroad sought to contest the order fixing the rates for the future it took an appeal under the provisions of the Public Service Company Law directly from the State Commission's order to the Superior Court of the State. It also sought to contest the decision of the Commission that the rates in the past had been unlawful and on its appeal raised the question of the power of the Commission to award reparation on shipments moving during the Guaranty Period. Let it be remembered that this was an appeal, not from the reparation order, but from a decision similar to that in *Docket No. 3206,* that the rates collected had been unlawful during the Guaranty Period and that it would later consider an application for reparation. In other words, the railroad took the very action, the failure to take which was said by the Court below in the case at bar to constitute a waiver of the defense relied upon.

But in that case the State Court said, as we believe to be the fact, that the appeal was premature to raise the objection sought to be interposed to the granting of reparation and that the parties should await the issuance of a reparation order and should test the validity of that order by a suit for its enforcement. The decision of the Superior Court dismissing the appeal from the Commission's decision was affirmed by the Supreme Court of the State. Since the reparation issue was discussed more fully in the opinion of the Superior Court we quote from that opinion and we direct the attention of this Court to the fact that the opinion clearly shows that the issue sought to be raised

on appeal, insofar as the matter of reparation was concerned, was the same issue that the plaintiffs-in-error here seek to have adjudicated and that the Court held that an adjudication could not be obtained by such an appeal but must be had in the manner pursued by the plaintiffs-in-error here, namely: the reparation order must first be issued and then sued upon. At page 554 of his opinion Mr. Justice Linn said:

> "4. Appellant objects that the commission retained 'jurisdiction of the case in the matter of reparation.' It contends that the Transportation Act prohibits granting reparation by providing in section 208a that the rates in effect on February 29, 1920, when federal control terminated, 'shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced * * * unless such reduction or charge is approved by the (Interstate Commerce) Commission.' During federal control both interstate and intrastate rates were made effective from time to time by the railroad administration, pursuant to Congressional authority. Necessarily during that period, state statutes prescribing how intrastate rates should become effective, were in abeyance. *N. P. R. Co.* v. *North Dakota,* 250 U. S. 135. In order that there might be no question that the rates prescribed by the railroad administration, and not the intrastate rates which had been effective pursuant to state statutes when federal control was taken, should continue effective on March 1, 1920, section 208a prescribed the status of the rates on the first of March, 1920, and until changed as specified. *Whether or not the section prohibits the granting of reparation is not before us on this record; at best that part of the order is interlocutory. There is nothing showing what questions may be raised on the subject.* Moreover, article VI, section

17 of the Public Service Company Law, July 26, 1913, P. L. 1374, provides that '* * * There shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided.' Article V, section 5, provides for reparation specified, and it is apparent from the opinion written by Mr. Justice SIMPSON, in *N. Y. & P. Co.* v. *N. Y. C. R.R. Co.*, 267 Pa. 64, that article V, section 5 'plainly requires the petition for reparation to be filed after the final decision on the question of the reasonableness of the rates.' Accordingly, the power company's prayer for reparation contained in the complaint that the rate was unreasonable, perhaps amounts to no more than notice that claim for reparation will be made if the rate be held unreasonable. We cannot reverse because the commission has given notice that it will hear a claim for reparation if presented by the power company." (Italics ours.)

The following language from pages 502 and 503 of the opinion of the Supreme Court indicates that it was likewise the view of that Court that the question of the effect of Section 208(a) upon a complaint for reparation on shipments during the Guaranty Period could not finally arise until an order of reparation had been issued.

"Section 208(a) does not prohibit a complaint from being filed against a rate established during federal control for the guarantee period. It does prohibit a reduction in rates without the approval of the Interstate Commission. The Superior Court found from the record sufficient evidence to sustain the state commission's order, and that the reduction was not confiscatory. Without considering the proceedings before the Interstate Commerce Commission on the complaint there filed, and, assuming the state's action was on a rate not before assailed, *if we affirm this order the carrier is not injured until the state commission's order is approved by the fed-*

eral commission, and afterwards only on an order of reparation.'' (Italics ours.)

We submit therefore that the decision of the Supreme Court of Pennsylvania in this case that the issues raised by the affidavits of defense should have been raised for adjudication by an appeal from the State Commission's decision in *Docket No. 3206* and that the plaintiffs-in-error by failing to appeal from that decision waived their defense, is directly contrary to the provisions of the Public Service Company Law as interpreted by the same Court in the other cases just cited.

There is a further point which is worthy of observation here and which confirms the arbitrary character of the decision of the Court below. The Public Service Company Law provides that in a suit for reparation the reparation order of the State Commission shall be only *prima facie* evidence of the facts therein stated. It is similar to the provision contained in Section 16 of the Interstate Commerce Act (41 Stat. L. 491) in which a reparation order of the Interstate Commerce Act is made *prima facie* evidence of the facts therein stated.

The purpose of these provisions is obviously to preserve to the carriers their constitutional right to a trial by jury on the question of damages by guaranteeing to them the opportunity in a suit to enforce a reparation order to submit to a jury evidence to disprove the findings under the statute. The finding of the Commission merely operates to shift the burden of proof to the carrier. If, however, a reparation order were conclusive evidence of the facts therein stated it is clear that there would be no question to be submitted to a jury. A reparation order would be open to attack only upon legal grounds with the result that a trial by jury of the essential questions of fact

would be denied. The Court below has held in effect that if carriers fail to appeal from a decision of the State Commission that reparation will later be awarded, the State Commission's decision becomes conclusive and the reparation order subsequently issued is not open to attack.

The effect of the decision of the Court below therefore is to construe the Public Serivce Company Law in such a way as to render a reparation order not *prima facie* evidence, but actually conclusive in that it is open to objection only upon certain legal grounds. The decision is therefore directly in conflict with the terms of the State statute itself providing that a reparation order shall be only *prima facie* evidence and it places upon the State statute a construction which renders the statute unconstitutional in that it deprives carriers of the rights guaranteed to them by the due process clause of the Constitution.

We submit that since the plaintiffs-in-error in seeking an adjudication of the federal question have acted in conformity with the provisions of the State law as construed in previous decisions of the State Courts, this Court should not now refuse to decide the federal question merely because the State Court in a decision so entirely at variance with its previous decisions and the statute itself as to be essentially arbitrary, has held that the plaintiffs-in-error have not pursued the proper procedure to present the federal question for determination.

(g) The cases cited by defendant-in-error in support of its motion to dismiss do not require dismissal of the writ of error on the facts in this case.

In view of the cases previously cited and the circumstances of this case above described, it is submitted that the authorities cited by the defendant-in-error in support of its motion to dismiss do not require that this Court should decline to review the decision of the Court below.

The first case cited is *Enterprise Irrigation District* v. *Canal Co., supra.* In that case there was drawn in question the controlling effect upon the parties to the suit of a decision of the State Board of Irrigation. By the plaintiff-in-error it was contended that the decision could not be given conclusive effect consistently with due process and the equal protection clause of the Fourteenth Amendment. By the defendant-in-error it was, among other things, contended that the plaintiff-in-error was estopped to maintain the suit by its conduct subsequent to the Board's decision. This Court held that the first question was a federal question and the other a non-federal question, that they had both been resolved in favor of the Canal Company by the State Court, that the defense of estoppal *in pais* was an independent ground of judgment and being sufficient to sustain the decision the judgment of the State Court would not be disturbed.

We contend first that that case is not an authority requiring a similar conclusion in the case at bar since here the federal issue goes to the entire case. But further than this we believe that the present case is of the sort described by Mr. Justice Van Devanter, in the language already quoted from his opinion in this very case at pages 40 and 41 of this brief in support of our contention that this is a case where the decision of the State Court will be reviewed.

The next case cited by our opponent is *Minnesota, etc., Ry.* v. *Washburn Co.*, 254 U. S. 370. It appeared in this case that the State legislature had prescribed a schedule of maximum rates for the transportation of coal by railroad between points within the State. Suit was brought for an injunction restraining the railroads from disobeying the law and collecting rates in excess of those therein named. The injunction was awarded and judgment was affirmed on appeal without prejudice to the rights of the carriers to reopen the case if after an adequate trial the rates proved to be confiscatory. Later the carriers did re-open the case and on appeal it was held that the rates were confiscatory and the injunction was dissolved. The railroads during the pendency of the injunction had obtained no order saving their right to demand or collect any rates in excess of those prescribed by the statute. This suit was brought to recover additional amounts on shipments transported prior to the dissolution of the injunction. On appeal to this Court it was contended that the rates charged were confiscatory. This Court, however, held that the State Court had decided against the carrier on the grounds (1) that there was no contract to pay any rate other than that shown in its tariff published in accordance with the statute, (2) that the injunction had been awarded without taking any bond securing to the carrier the right to collect additional amounts, and (3) that there was no claim that the shipper had been unjustly enriched at the expense of the railroad since the shipper was no more responsible for the situation than the carrier. These grounds were all entirely apart from the federal question which was not passed upon by the State Court.

It is plain, we believe, that the dismissal of a writ of error on such facts affords no precedent for dismissing the writ of error in the case at bar. In the case cited the

soundness of the State Court's decision could not be questioned. In its decision it did not undertake to pass upon the federal question at all as did the Court below here, its decision on the state ground was not based upon a misconception of the facts and issues and the state ground was entirely independent and distinct from the federal issue which, as we contend, is not the fact in the case at bar.

In the case of *Nickel* v. *Cole,* 256 U. S. 222, the next case cited by our opponent, the question involved was whether a transfer tax had been properly assessed on a certain transaction under the provisions of the State statute. The answer to this question turned upon whether the transfer in question was a transfer of the character to which the statute by its terms was applicable. This was clearly a question of the interpretation of a State statute and this Court held that the decision of the State Court was binding upon it. The Court, however, limited the instances in which it would feel compelled to adopt the State Court's view by the following language which, as we believe, excludes from that category the case at bar (p. 225):

> "But the answer to this is that when as here there can be no pretense that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong."

Howat v. *State of Kansas,* 258 U. S. 181, cited by our opponent, was simply one of a number of cases in which this Court has found that the case had been disposed of by the State Court without any consideration of the federal question and upon state grounds with which it agreed, and under these circumstances has declined to consider the federal question. The case is of no assistance in determining

whether the facts in the case at bar support the jurisdiction of this Court to review the decision of the State Court.

One other case recently decided, although not cited by our opponent, is worthy of comment, *Central Union Telephone Co.* v. *City of Edwardsville,* 70 L. ed. (Adv. 113), decided by this Court November 23, 1925. That was a suit to recover taxes claimed to be due under a local ordinance imposing a tax of 50 cents a telephone pole on every person, firm or corporation owning, controlling or operating poles in the streets of Edwardsville. It was contended by the telephone company that this ordinance deprived it of its property without due process of law and impaired the obligation of a contract represented by an earlier ordinance permitting the telephone company to occupy the streets. The Trial Court held that the earlier ordinance was not a contract and that therefore the tax ordinance was not unconstitutional as impairing a contract. An appeal was taken to the State Appellate Court which transferred the case to the Supreme Court of the State on the ground that the Appellate Court had no jurisdiction. The Supreme Court held that the case had been improperly transferred to it because of the appeal to the Appellate Court and therefore remanded the case to the latter court where the judgment of the Trial Court was affirmed. Certiorari to the Supreme Court of the State was then obtained and in such proceeding that Court declined to hear the constitutional questions on the ground that they had been waived by the failure to take the case directly from the Trial Court to the Supreme Court for a review of these questions as required by the State law as theretofore interpreted by numerous decisions of the State Courts. On these facts this Court in turn declined to consider the constitutional questions and dismissed the writ of error.

It may be argued that that decision is a precedent requiring a dismissal of the writ of error in the case at bar, for therein this Court refused to disturb the decision of the Court below that under the State practice the constitutional question had been waived. However, we direct attention to the following very significant features of the decision in that case which, we believe, far from requiring a dismissal of the writ of error here, support our contention that the Court has jurisdiction in the present case.

In the first place, it will be observed that the decision of the State Court with regard to the requirements of the State practice was consistent with a long line of cases construing the State procedural statute. This fact was expressly commented upon by this Court. In the case at bar, on the other hand, as we have pointed out, the decision of the State Court that the State law required an appeal from the Commission's decision in *Docket No. 3206* in order to save the federal question was directly contrary to previous decisions of the same Court construing the same statute.

Moreover, it will be seen that this Court in the case cited held that it would follow the decision of a State Court that a federal question had been waived under the State practice only "if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that Court." For the reasons which have been set forth earlier in this discussion we submit that a practice requiring an appeal from the Commission's decision in *Docket No. 3206* would not have given the plaintiffs-in-error a reasonable opportunity to litigate the federal question, since this federal question depended upon conditions not existing at the time such an appeal must have been taken. This Court gives further emphasis to the fore-

going limitation of its opinion by stating: "It seems to us that the practice under the statute of Illinois, above quoted, is entirely fair." We submit that the practice under the law of the State of Pennsylvania as construed by the State Court in the present case would be entirely *unfair* and that therefore a decision based upon such practice should not be considered by this Court controlling upon it.

Finally, there is a very fundamental distinction between the two cases upon the facts involved, which distinction, as we believe, amply confirms our contentions as to the Court's jurisdiction here. In the *Central Union Telephone Company Case, supra,* the facts which gave rise to the federal question and upon which the determination of that question depended were all in existence at the conclusion of the proceeding in the Trial Court and at the time the appeal to the Supreme Court should have been taken, as the State Court found. In the case at bar, on the other hand, as we have seen, the facts upon which the defense under Section 208(a) of the Transportation Act, 1920, is predicated were not in existence at the time the State Commission's decision in *Docket No. 3206* had been announced. No reparation order had been issued, none might ever be issued. Before such an order might be sought to be enforced the Interstate Commerce Commission's approval might have been obtained. The State Commission did not decide the issue of the enforcibility of a reparation order without such approval and to whatever Court an appeal might have been taken such an appeal could not present issues depending upon facts not then in existence.

II

EVEN IF THE WRIT OF ERROR WAS IMPROPERLY SOUGHT THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI IN ORDER TO REVIEW THE DECISION OF THE COURT BELOW.

For the reasons indicated we have believed that the contentions advanced in defense of the suit below brought in question the validity of the State statute or order of the State Commission and that therefore since the decision of the State Court was in favor of their validity the jurisdiction of this Court was properly invoked by application for writ of error. We conceive, however, that it may be a close question whether the defense asserted raises a question of the validity of the State statute and of the State Commission's order or whether it amounts to the assertion of a right under a federal statute which has been denied by the State Court. Probably it does both.

The railroads claim that under Section 208(a) of the Transportation Act, 1920, they had a right to charge the freight rates which were collected upon the shipments here involved and they assert this claim because Section 208(a) of the Transportation Act, 1920, provided that the rates in effect on February 29, 1920, should continue in effect until thereafter changed by State or Federal authority or pursuant to authority of law and should not be reduced prior to September 1, 1920, without the approval of the Interstate Commerce Commission, and because that Commission has never approved any reduction in the rates charged as applied to shipments moving during that period. If this is an assertion of a right under a federal statute, the decision of the State Court that the railroads were not entitled to charge the rates which they claimed to be lawful under

the Transportation Act, 1920, was a denial of this right and the case is one which this Court under Section 237 of the Judicial Code may review on writ of certiorari.

Because of the doubt as to the exact character of the defenses asserted a petition for writ of certiorari has been filed with this Court, and has not yet been acted upon.

In opposition to the issuance of this writ it is urged by our opponent as it has been urged in support of the motion to dismiss the writ of error, that the decision of the State Court with respect to the failure to appeal from the State Commission's decision in *Docket No. 3206* should prevent a review of the case by this Court.

In support of our petition for writ of certiorari we argue, for the reasons already advanced under the previous point in this brief, that the State Court's decision was not on an independent state ground, and moreover that it was so patently erroneous and unfair to the petitioners that it should not be considered binding on this Court.

We believe that a federal question is involved and that the circumstances of the case justify a review by this Court of the decision of the Supreme Court of Pennsylvania, whether this review be had on writ of error or on writ of certiorari.

III

BY REASON OF SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, THE FACT THAT THE CHARGES COLLECTED ON SHIPMENTS MOVING BETWEEN MARCH 1 AND SEPTEMBER 1, 1920, WERE COMPUTED ON THE BASIS OF THE RATE IN EFFECT ON FEBRUARY 29, 1920, AND THE FURTHER FACT THAT NO REDUCTION IN THAT RATE FOR THE PERIOD PRIOR TO SEPTEMBER 1, 1920, HAD OR HAS BEEN APPROVED BY THE INTERSTATE COMMERCE COMMISSION CONSTITUTE A COMPLETE DEFENSE TO THE SUIT OF THE DEFENDANT-IN-ERROR UNDER ARTICLE V, SECTION 5, OF THE PUBLIC SERVICE COMPANY LAW OF PENNSYLVANIA TO ENFORCE THE REPARATION ORDER MADE BY THE STATE COMMISSION RELATING TO SUCH SHIPMENTS.

> "SEC. 208(a). All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

The foregoing language of Section 208(a) of the Transportation Act, 1920, is so clear and so unambiguous that only two arguments, both of them, as we believe, unsound, have been suggested in support of the contention advanced by the defendant-in-error that the defense asserted by the

carriers in this case was not a good and complete defense under the provisions of this federal statute. The two points thus urged are, *first*, that Section 208(a) of the Transportation Act, 1920, had no application to intrastate transportation during the Guaranty Period either because by its terms it did not relate to such transportation or because, if it purported to do so, it was unconstitutional; and *second*, that even if Section 208(a) was applicable to intrastate rates, the reparation order of the State Commission in *Docket No. 738*, to enforce which this suit was brought, was not a reduction of a rate or, if enforced, would not result in a reduction of a rate and therefore did not come within the prohibition of the last clause of Section 208(a) prohibiting any reduction prior to September 1, 1920, without the approval of the Interstate Commerce Commission.

A. SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, WAS INTENDED TO AND BY ITS TERMS DID APPLY TO INTRASTATE TRANSPORTATION.

We think it can not be seriously questioned that Section 208(a) of the Transportation Act, 1920, was intended to relate not only to interstate but also to intrastate rates. Were this not so there would be no meaning in the reference to "State authority" in the first clause of the section, providing that the rates in effect on February 29, 1920, should continue in force "until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law." For it is obvious that "*State* authority" could not be exercised to change *interstate* rates. Moreover, this description in the first clause of the section is "*all* rates, fares and charges." There is no intimation that the word "all" is to be construed as meaning "all *interstate* rates, fares and charges."

That the last clause of the section prohibiting a reduction prior to September 1, 1920, without the Interstate Commerce Commission's approval is equally applicable to state rates is apparent from its language. For the rates which are not to be reduced are described as "any *such* rate, fare, or charge," the "such" necessarily referring to the rates, fares and charges described in the first clause of the section.

The purpose of the section renders this conclusion inescapable. During the period of Federal control the President through the Director General of Railroads had authority to prescribe both intrastate and interstate rates, state laws and orders to the contrary notwithstanding. *Northern Pacific Ry.* v. *North Dakota, supra.* In the exercise of this authority the President increased both interstate and intrastate rates to a level very substantially higher than that in effect prior to Federal control and in many instances higher than permitted by State statutes or orders. At the termination of Federal control it was obviously necessary to provide some means of stabilizing the transportation machinery of the country until a reasonable opportunity should be afforded for readjustment to private control and operation. If in lieu of the rates established by the Director General of Railroads there were immediately to be substituted rates which might be required by State laws or regulations a condition of chaos would have been inevitable. There can be no doubt that the purpose of Section 208(a) was to meet this situation and to provide a firmly stable and compensatory basis of rates during the period of readjustment. There is therefore every reason why Congress should have intended to continue in effect both the interstate and intrastate rates which had been established by the Director General, until further action by the State and Federal authorities with reference thereto which would take into consideration the changed conditions which had

arisen during the period of federal operation. Indeed it was the very fact of the existence of the State laws which made especially necessary some provision by Congress for the continuance of a stable rate structure, for it was largely State laws that fixed rates which had been exceeded by the Director General. So that if Section 208(a) as a whole did not apply to intrastate rates it would have failed to meet one of the conditions most requiring its enactment.

This is the more apparent when the further and special purpose of the particular clause here in issue is considered, the clause prohibiting a reduction in rates prior to September 1, 1920, without the Interstate Commerce Commission's approval. The period from March 1 to September 1, 1920, was the period during which by Section 209 of the Transportation Act, 1920, Congress guaranteed the revenues of the carriers which had been under Federal control. The fact that it was during this period that this clause prohibited reductions in rates without the Interstate Commerce Commission's approval makes it clear that by this clause Congress was seeking not only to maintain a stable rate structure for the convenience of the carriers and shippers, but also and primarily to protect itself under the guaranty. Congress primarily intended that so long as it guaranteed the carriers' revenues their rates should be under Federal supervision. This intent must therefore have been aimed chiefly at the state rates since interstate rates were under Federal supervision without such a provision.

That Section 208(a) was intended to apply to state rates is further borne out by incidents occurring during the history of the legislation.

The bill which later became the Transportation Act, 1920, was reported by the House Committee on Interstate Commerce November 10, 1919, Report 456, 66th Congress.

In this report the committee made the following reference to Section 208(a):

> "In view of the enormous increase in operating costs of carriers, due to increased wages and cost of materials, restoration to former level would result in such enormous decrease in revenues as would render it utterly impossible, even for the stronger railroads, to meet operating expenses. By the insertion of the above section, the existing rates, fares, charges, etc., are to continue in force and effect until changed by or pursuant to authority of law; that is, until changed by the appropriate regulatory body."

The chairman of the House Committee in presenting the bill spoke of the provision as follows:

> "It is apparent that unless we put in a provision of this kind, then as soon as the Federal control ended all the rates made under Federal control would cease and the rates would revert to their pre-control status—both interstate and intrastate. It is clear to all that that would be calamitous. If the rates of the railroads now existing as fixed by the director general, should suddenly be brought to a precontrol level there would scarcely be a railroad in the United States that could begin to pay operating expenses. * * * If control ceases without this section in the bill, the rates would be dropped 25 per cent. on freight and 50 per cent. on passengers, with the consequences I have already stated" (Congressional Record, Nov. 11, 1919, p. 8314).

It is especially significant that after it had been pointed out to the House by a member of that committee that the language then contained in the bill was intended to reach both state and federal authority, a member of the House proposed to amend the bill by inserting the following:

> "Provided, that nothing in this section shall be construed to include intrastate shipments."

To this proposed amendment the member in charge of the bill replied:

> "That is not the intention. They are continued until the proper State authorities can pass upon them. Otherwise they would come back to pre-war rates" (Congressional Record, Nov. 13, 1919, p. 8451).

It will be observed that the amendment was not embodied in the bill as passed.

We therefore submit that Section 208(a) of the Transportation Act, 1920, was intended to, and by its terms did, apply to intrastate as well as to interstate rates and that the clause prohibiting a reduction in rates prior to September 1, 1920, without the approval of the Interstate Commerce Commission was intended to be a restriction upon the State authorities.

B. SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, IS NOT UNCONSTITUTIONAL AS APPLIED TO INTRASTATE RATES.

It is urged that if Section 208(a) applied to intrastate rates it must be unconstitutional as an unwarranted interference by the Federal Government with State power. This contention, we believe, overlooks the true character of the legislation, which is not and did not purport to be a permanent interference with State's rights but was merely legislation looking to a demobilization of the national resources following the termination of the war. That legislation looking to demobilization is as much within the war power of Congress as legislation relating to the initiation or active carrying on of war is well settled. *Commercial*

Trust Co. v. *Miller,* 262 U. S. 51. 57; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264; *Dryfoos* v. *Edwards,* 284 Fed. 596.

The assumption by the Federal Government of the operation of the railroads of the country was justified as an exercise by the Federal Government of its war power and it was on this ground that it was held in the *North Dakota Case, supra,* that an intrastate rate established by the Director General pursuant to the terms of the Federal Control Act was not unlawful merely because it was contrary to the requirements of a State statute or the orders of a State regulatory body.

If the taking over of the railroads and their operation by the Federal Government was a proper exercise by Congress of its war power then it logically follows, we believe, that the return of the railroads to their private owners was likewise a proper exercise of this same power. For it must be plain that the taking over of the railroads and their operation during the continuance of the war involved their return at the war's conclusion. As was said by this Court in the case of *Stewart* v. *Kahn,* 11 Wall. 493, 507:

> "* * * the [war] power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and *to remedy the evils which have arisen from its rise and progress.*" (Italics ours.)

We submit that since, as this Court has held, Congress in the exercise of its war power could deal with intrastate rates regardless of State regulation, it could likewise in the exercise of the same power in providing for the termination of federal operation enact such legislation with respect to intrastate as well as interstate transportation

as was reasonably necessary for such termination and for the return of the railroads to their owners. And we submit that Section 208(a) of the Transportation Act, 1920, was legislation reasonably appropriate to this end.

This view was clearly stated by the Court of Appeals of New York State in *Public Service Commission* v. *New York Central R. R.*, 230 N. Y. 149, 153, where it said:

> "Yet the process of readjustment was complex. And the power to seize the roads carried with it such reasonable power as was needed to bring about that readjustment in an orderly and equitable manner. The government had operated competing roads as part of one system. It had distributed cars as its needs required. It had increased the wages of employes. It had fixed the rates of fare both interstate and intrastate. The public good required that the normal state of affairs should be re-established with the least possible disturbance. Congress was well within its rights, therefore, when it provided that the tariffs in force on February 29, 1920, should continue until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, and in no case should be reduced before September 1, 1920, without the approval of the Interstate Commerce Commission."

In *Michigan Central R. R. Co.* v. *Michigan Pub. Utilities Comm.*, 271 Fed. 319, on application for a preliminary injunction restraining the State Commission from enforcing a Michigan statute fixing a rate of 2½ cents a mile for passenger transportation immediately upon the expiration of the Guaranty Period, September 1, 1920, a special court of three judges said as follows (p. 324):

> "We find it unnecessary to consider these contentions, because we think the congressional right to effectuate the intent which we have found in sec-

> tion 208a is sufficiently based on the war power. The right to fix intrastate rates during federal control and as incidental to the war power is settled. *Northern Pac. Co.* v. *North Dakota,* 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L.Ed. 897. It is also beyond dispute—indeed, it is not denied by the Attorney General here—that the same power would extend to and cover federal regulation of state rates for a reasonable transition period (*Stewart* v. *Kahn,* 78 U. S. [11 Wall.] 493, 506, 20 L.Ed. 176), as incidental to the return of the railroads to their owners, covered by a shield which should prevent their immediate destruction; but it is claimed that the six months from March 1st to September 1st, during which the federal guaranty continued, exhaust such transitional or twilight period, * * *"

Under these circumstances the contention which has been advanced and which was adopted by the Court below (R. 94) that the rate involved in this case was not subject to the Federal statute because it in no way affected interstate commerce or resulted in discrimination against such commerce must fail. It would be otherwise if the authority for the enactment of the statute were to be sought in the power of the Federal Government to regulate interstate commerce. But the applicability of Section 208(a) of the Transportation Act, 1920, to the state rate in the present case depended not upon the power of Congress to regulate interstate transportation but upon the authority of Congress in the exercise of its war power to enact legislation touching intrastate transportation.

C. THE PROHIBITION OF SECTION 208(a) OF THE TRANSPORTATION ACT, 1920, OF A REDUCTION OF RATES DURING THE GUARANTY PERIOD WITHOUT THE APPROVAL OF THE INTERSTATE COMMERCE COMMISSION RENDERS UNENFORCIBLE UNDER THE STATE LAW A REPARATION ORDER OF A STATE COMMISSION AWARDING REPARATION ON INTRASTATE SHIPMENTS IN THE AMOUNT OF THE DIFFERENCE BETWEEN THE RATE IN EFFECT ON FEBRUARY 29, 1920, AND A LOWER RATE UNLESS REDUCTION APPROVED BY THE INTERSTATE COMMERCE COMMISSION.

If, as we have argued, Section 208(a) of the Transportation Act, 1920, was applicable to intrastate rates, there can be little doubt that it would have prohibited the enforcement of an order of the State Commission issued in March, 1920, directing the carriers immediately to establish a through rate of $1.00 in lieu of the rate of $1.10 in effect on February 29, 1920, unless such reduction had had the approval of the Interstate Commerce Commission.

We submit that the enforcement of the reparation order in *Docket No. 4738* comes equally within the prohibition of Section 208(a).

This order requires the carriers to refund to the defendant-in-error the difference betwen the freight charges collected on its shipments moving during the Guaranty Period on the basis of the $1.10 rate and a lower rate of $1.00 which according to the State Commission's view would have been the maximum reasonable rate for the period in question. In substance, the enforcement of the reparation order would effect a reduction in the rates charged during this period, for its result would be to put the parties in the position in which they would have been had the reduced rate of $1.00 been published and charged at the time the shipments moved. True, it would be a retroactive reduction, but there is nothing in the language of Section 208(a) to indicate

that it was only prospective reductions of rates which came within the prohibition contained therein. Furthermore, the entire purpose of the provision indicates that such could not have been its meaning.

By Section 209 of the Transportation Act, 1920, Congress, in order to stabilize the transportation system of the country following the termination of federal operation and during the process of readjustment to the operation of the roads by their corporate owners, guaranteed the revenues of the railroads for a period of six months after March 1, 1920. It was but natural that in making this guarantee Congress should likewise take precautions to protect the Federal Government from undue demands under this guarantee, resulting from a sudden falling off in the carriers' revenues caused by reductions in their rates either voluntary or required by State regulatory authorities.

We believe that it was clearly for this purpose that the last clause was inserted in Section 208(a) to the effect that no reduction in rates should be made during the Guaranty Period without the approval of the Interstate Commerce Commission.

In the case of *New York Central R.R. Co.* v. *Public Service Comm.*, 268 Fed. 558, the Court expressed this view of the purpose of this clause saying:

> "The continuance of the Federal rates for six months from March 1, 1920, was coincident with the Government's guarantee of just compensation to the railroads for this period provided in Section 209 and is a protection to the Government."

From Section 209 it will be seen that that which the Government guaranteed as to every carrier which had been

under Federal control was "the railway operating income of such carrier for the Guaranty Period." Other portions of the Act make it clear that by this was meant the railway income received by the carrier from its operations during that period. We submit that if a carrier receiving from these operations a certain amount based upon the rates then in effect should thereafter be required to refund a portion of the amount so collected on the theory that the rates were too high, the net result would be that the carrier would have received from its operations during the Guaranty Period only charges on the basis of the reduced rates and the obligation of the Federal Government under its guarantee would depend upon how much the net amount retained by the carrier as compensation for its operation during the Guaranty Period should fall short of the amount which Congress guaranteed to the carrier from these operations. Since the purpose of the last clause of Section 208(a) was patently to protect the Federal Government in its guaranty it follows that Congress in enacting this clause must have intended to prohibit, except with the Interstate Commerce Commission's approval, retroactive as well as prospective reductions which would operate to reduce the revenues derived by the carriers from operations during the Guaranty Period.

It has been suggested that the reparation order is an award of damages and is therefore something different from a reduction in rates. Such seems to have been the view of the Supreme Court of California in the case of *Southern Pacific Co.* v. *Railroad Comm.*, 194 Cal. 734, 231 Pac. 28, which was a case quite similar to the case at bar. We submit, however, that this contention disregards entirely both the substance of the transaction and the purpose sought to be attained by the statute, as above outlined; and also overlooks the true character of an award of reparation un-

der these circumstances. The primary purpose of an award of damages in a case such as this is to put the parties as nearly as may be in the position in which they would have been had the alleged unlawful act not been committed. The act here alleged to have been unlawful was the collection of a freight rate higher than the rate of $1.00 which the State Commission found would have been reasonable and the purpose of the reparation order was to adjust matters as between the parties to the case so that they would be in the position in which they would have found themselves had the carriers in the first instance collected the $1.00 rate. Certainly whatever this may be called it is an actual making effective of a reduction in the rate. And if without the Interstate Commerce Commission's approval the carriers could not have been required in advance to collect $1.00 instead of $1.10, how can they now without such approval be required to adjust matters in the name of "damages" so that it will be as if they had actually collected but $1.00?

It is beyond belief that there should be imputed to Congress any such disingenuous motive as would be indicated by a statute which would have this effect. By such a statute Congress would have told the carriers: "We guarantee your earnings for six months and we won't let your rates be reduced during that period without our approval," and would later have said to them: "Now that you have collected the rates which we ordered you to maintain we have fulfilled our guarantee, as we made no undertaking to you that we would protect you from countless suits and claims for damages for the collection of these very rates which we required you to maintain, which suits will deplete your treasury as effectively as if the rates had been reduced in advance, but will take the depletion out of you after our guarantee has ended rather than out of your current revenues during the time that we guaranteed them."

Further, it has been suggested by the defendant-in-error, and the suggestion seems to have been accepted by the Supreme Court of Pennsylvania, that for some reason the enforcement of the reparation order of the State Commission would effect a "correction" and not a reduction in rates—as though a correction which reduces were not a reduction. The facts upon which this suggestion has been predicated are that the State Commission in 1917, long prior to Federal control, ordered a reduction in the then existing rate of one of the plaintiffs-in-error, namely, the rate of the New York Central Railroad Company from the mines to Bald Eagle Junction; that the rate of $1.10 established by the Director General and in effect on February 29, 1920, which was charged upon most of the shipments involved in this suit, was arrived at by adding the increases prescribed by the Director General in his General Order No. 28 not to the reduced rate which the State Commission had prescribed in 1917, but to the rate which the State Commission had then found unreasonable; and finally that the rate of $1.00 which it was the purpose of the reparation order here sued upon to render effective is the rate which would have resulted had the General Order No. 28 increases in rates been computed with reference to the rate fixed by the State Commission's order of July, 1917.

However, Section 208(a) of the Transportation Act, 1920, prohibits reductions during the Guaranty Period without the Interstate Commerce Commission's approval not only in rates which were the result of the application of General Order No. 28 to rates previously approved by State administrative tribunals prior to Federal control, but in *all* rates in effect on February 29, 1920 (without reference to how they may have been computed). No language of the statute requires us to ascertain how these rates were arrived at so long as they were in effect. Applying the plain

language of this statute to the situation in the case at bar we find that the rate charged on the shipments here involved was $1.10 which was the rate in effect on February 29, 1920. No reduction in this rate as applied to shipments during the Guaranty Period had or has been approved by the Interstate Commerce Commission. The reparation order of the State Commission purports to require the plaintiffs-in-error to refund the difference between this rate and a rate of $1.00 determined by that Commission to be reasonable. Therefore whether or not in the eyes of the State Commission its action might be called a correction of an erroneous situation its order is in effect an order for a reduction of a rate under circumstances clearly within the prohibition of the federal statute.

The language of the opinion of the Pennsylvania Supreme Court suggests that the idea that there may be some distinction under Section 208(a) between a reduction and a correction and that the reparation order of the Commission here sued upon is a correction, may be derived from an erroneous reading of its own opinion in the case of *Lehigh & New England* v. *Public Service Comm., supra,* where the word "correction" is used. The situations in the two cases, however, are clearly distinguishable, and the distinction merely serves to emphasize the soundness of the contentions made by the carriers here.

In the *Lehigh & New England Case, supra,* as here, the rate charged on the shipments during the Guaranty Period was the rate in effect on February 29, 1920,—that is, it was in effect in the sense that it was contained in published tariffs filed with the proper authorities. However, prior to the termination of Federal control a complaint had been filed with the Interstate Commerce Commission under Section 10 of the Federal Control Act (40 Stat. L. 456) alleging that

this rate contained in the published tariffs was unreasonable. The Interstate Commerce Commission instead of finding the rate reasonable, as it did in the case at bar, found it unreasonable to the extent that it exceeded a lower rate which it found would have been reasonable for the period of Federal control. This lower rate the State Commission subsequently found to have been a reasonable rate for the period after March 1, 1920. The effect of the Interstate Commerce Commission's decision in that case was that the rate actually contained in the published tariffs was an unlawful rate to the extent that it exceeded the lower rate found reasonable and therefore was not lawfully in effect on February 29, 1920. The State Commission in awarding reparation to the basis of the lower rate was merely making effective during the Guaranty Period the rate which the Interstate Commerce Commission said would have been reasonable for the period of Federal control. It was in this connection that the Supreme Court of the State in reviewing the case, while clearly recognizing that Section 208(a) would otherwise prohibit a reduction during the Guaranty Period, said at page 502 of its opinion:

> "The State Commission, acting under 208(a), did not reduce a rate, but rather enforced the *corrected* rate."

meaning the rate found by the Interstate Commerce Commission to have been reasonable for the period of Federal control.

How erroneous is the application of this language to the case at bar is apparent when it is realized that in this case the Interstate Commerce Commission was likewise called upon to pass upon the reasonableness of the rate actually published in the carriers' tariffs in effect on February 29,

1920, as applied to shipments moving during Federal control, but found that this rate was just, reasonable and otherwise lawful, regardless of the fact that it was the result of adding the General Order No. 28 increases to a rate which the State Commission had found unreasonable. Thus the rate of $1.10 was not only in effect on February 29, 1920, in the sense that it was contained in the published and filed tariffs but was lawfully in effect since it was found to be reasonable. There was therefore no justification for the action of the State Commission in this case in prescribing a lower rate for the Guaranty Period on the theory that in so doing it was correcting the rate charged to the basis of a rate found reasonable by the Interstate Commerce Commission.

We accordingly urge that whatever contentions our opponents may advance in this connection a judgment for the defendant-in-error enforcing the payment of the reparation ordered by the State Commission in *Docket No. 4738* will in effect amount to a reduction in the rate during the Guaranty Period. Therefore since no reduction in this rate has been approved by the Interstate Commerce Commission and a reduction in rates during the Guaranty Period is prohibited by the Federal statute without such approval, the right of the plaintiffs-in-error under the federal statute to collect charges on the basis of the $1.10 rate must be clear, the reparation order of the State Commission and the Public Service Company Law of the State which would give a cause of action for its enforcement must be invalid because in conflict with the Federal statute, and these facts must constitute a complete defense to this suit under the State law to enforce the reparation order.

D. THE RATES CHARGED ON THE SHIPMENTS INVOLVED IN THE CASE WERE LAWFUL UNDER SECTION 208(a) OF THE TRANSPORTATION ACT, 1920. THEREFORE THEY WERE NOT UNLAWFUL UNDER THE STATE PUBLIC SERVICE COMPANY LAW AND NO SUIT FOR DAMAGES FOR A VIOLATION OF THAT STATUTE CAN BE MAINTAINED.

This is an action for damages under the Public Service Company Law of Pennsylvania. The allegation is that plaintiffs-in-error collected freight charges which were in violation of that statute in that they were unreasonably high. The reparation order of the State Commission is alleged to be *prima facie* evidence of this fact.

If, as we contend, the charges collected were lawful under Section 208(a) of the Transportation Act, 1920, and the federal statute is controlling, the charges could not have been unlawful under the Public Service Company Law of the State; the order of the State Commission can in no way affect their legality and the provisions of a State statute which would make such an order *prima facie* evidence of the unlawfulness of the rate must be invalid in the face of the federal law.

The freight charges collected were based upon the rate in effect on February 29, 1920. That rate was held to be lawfully in effect at that time by the Interstate Commerce Commission. No reduction below that rate was approved or has since been approved by that body.

We therefore submit that under the Transportation Act, 1920, the rates charged were lawful rates. It follows that to hold that the collection of rates lawful under a federal statute constituted a violation of the Public Service Company Law which would create a cause of action for damages under the terms of the State law would amount to denying to the federal statute its controlling effect.

One further contention which has been advanced by the defendant-in-error may be discussed under this point. It is a contention that seemed to carry weight with the Supreme Court of California in the *Southern Pacific Case, supra.* It has been urged that the Interstate Commerce Commission has itself ruled that under Section 208(a) of the Transportation Act, 1920, it has been without power since September 1, 1920, to approve a reparation order with respect to shipments moving during the Guaranty Period. (Conference Ruling of March 13, 1922. See also *Armour & Co.* v. *G. N. Ry. Co.,* 104 I. C. C. 34.) From this it is argued that if the Interstate Commerce Commission is correct in its ruling that it is without power to approve such an order, the result of sustaining the contention of the plaintiffs-in-error here will be to deprive parties of relief from the collection by carriers of unreasonable charges on intrastate shipments during the Guaranty Period.

In the first place, we believe that the Interstate Commerce Commission was probably in error in its view that its power to approve reductions in rates during the Guaranty Period expired at the end of that period. For if the enforcement of an order of reparation relating to shipments during the Guaranty Period in substance causes a reduction in rates for that period then the approval of the Interstate Commerce Commission is certainly required by the statute and there is nothing in the language of Section 208(a) to indicate that although such approval was required it could not be accorded after September 1, 1920.

In the second place, however, we believe that so far as the present case is concerned it is immaterial whether or not the Interstate Commerce Commission was correct in its view. The fact remains that it has not approved a reduc-

tion in the rates here collected. Not only that but it has held that the rate of $1.10 was reasonable. We submit, therefore, that the rates charged were lawful rates under the provisions of the Transportation Act, 1920, and being lawful rates the defendant-in-error has no ground for complaint that it cannot recover reparation, because it has no foundation for a claim for reparation in the doing by the plaintiffs-in-error of an unlawful act.

Suppose that the State Commission's order had been prospective and had been issued in March or April, 1920, and the Interstate Commerce Commission had refused its approval of a reduction in the $1.10 rate for the Guaranty Period or its approval had never been sought, is it not clear that the rate of $1.10 would have remained the only lawful rate under the Transportation Act, 1920.

No right to damages exists unless there has been some unlawful act and if the rates collected were in accordance with the terms of the federal statute they were not in any sense unlawful.

To say that rates were lawful under the Transportation Act, 1920, and yet that the parties were entitled under the State law or otherwise to damages because of the collection of such rates is absurd and denies to the federal statute its controlling effect.

CONCLUSION

We respectfully submit that the judgment of the Court below should be reversed.

Respectfully submitted,

HENRY WOLF BIKLE,
FREDERIC D. McKENNEY,
PARKER McCOLLESTER,
For Plaintiffs-in-Error.

APPENDIX

TRANSPORTATION ACT, 1920

EXISTING RATES TO CONTINUE IN EFFECT.

SEC. 208. (a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

(b) All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

(c) Any land grant railroad organized under the Act of July 28, 1866 (Chapter 300), shall receive the same compensation for transportation of property and troops of the United States as is paid to land grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (Chapter 278).

GUARANTY TO CARRIERS AFTER TERMINATION OF FEDERAL CONTROL.

SEC. 209. (a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore

engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in Section 4 of the Federal Control Act;

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in Section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under Section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operating income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one-half the annual sum fixed by the President under Section 4 of the Federal Control Act;

(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under Paragraph (1), (2), or (4) of Subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway

operating income of any carrier entitled to a guaranty under Paragraph (3) of Subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under Section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under Section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in Section 1 of the Federal Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in Paragraph (a) of Section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and

operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

SEC. 5. If, after hearing, upon complaint or upon its own motion, the commission shall determine that any rates which have been collected, or any acts which have been done or omitted to be done, or any regulations, classifications, or practices which have been enforced for, or in relation to, any service rendered after this act becomes effective, by any public service company complained of, were in violation of any order of the commission, or were unjust and unreasonable or unjustly discriminatory, or unduly or unreasonably preferential; or, in like manner, shall find that the rates so collected are in excess of the rates contained in the tariffs or schedules of any such public service company on file or posted, and in effect and applicable at any time the said service was rendered,—the commission shall, upon petition, have the power and authority to make an order for reparation, awarding and directing the payment to any such complainant, petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of said unjust, unreasonable, or unlawful collections, acts or commissions, regulations, classifications or practices, of such public service company: Provided, That such damages have been actually sustained by such complainant petitioner.

The commission shall state in said order the exact amount to be paid, as well as its findings upon pertinent questions of fact.

If the public service company does not comply with the aforesaid order for the payment of money within the time fixed therein, the person named therein, to whom such payment is directed to be made, may sue therefor in any court of common pleas of this Commonwealth; and said order made by the commission shall be prima facia evidence of the facts therein stated, and that the amount awarded is justly due the plaintiff in such suit, and the defendant public service company shall not be permitted to avail itself of the defense that the service was, in fact, rendered to the plaintiff at the rate contained in its tariff or schedules in force at the time payment was made and received.

No reparation, as herein provided, shall be awarded by the commission unless the complaint or petition shall have been filed with it within two years from the time when the cause of action accrued. A suit for the enforcement of an order directing such payment shall be filed in the said court of common pleas within one year from the date of the order, and not after.

No action shall be brought in any court on account of the wrongs or injuries referred to in this section, unless and until the commission shall have determined that the rate, regulation, classification, practice, act, or omission in question was unjust, unreasonable, or unjustly discriminatory or unduly or unreasonably preferential, or in excess of the rates contained in the said tariffs or schedules, and, then, only to recover such damages as may have been awarded and directed to be paid by the commission in said order.

Sec. 17. Within thirty days after filing of any finding or determination by the commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court; Provided, That there shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided. The said court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all said appeals: Provided, That in case of an appeal from the award of damages or compensation by the commission, under any of the provisions of this act, the appeal shall, in case any party is entitled to demand a jury trial under section eight of article sixteen of the Constitution of this Commonwealth, be to the courts of the proper county thereof, but in all other cases shall be to the said Superior Court. If an appeal be made to any court other

than the Superior Court, the case shall be proceeded with therein in accordance with the practice and procedure made and provided in such cases. In case of any appeal from the award by the commission of damages or compensation for property taken, injured, or destroyed, where the commission shall have power to apportion the amount thereof among, or direct the payment thereof by, any public service companies or municipal corporations concerned, any such public service company or municipal corporation may intervene and be heard in the trial of such appeal, under such rules and regulations as the court in which the said appeal may be pending shall prescribe. All appeals to the Superior Court shall be by petition to said court, setting forth specifically and concisely the error or errors assigned to the finding, determination, or order of the commission; which petition shall be accompanied by a copy of the original complaint, if any, filed with the commission, as well as a copy of the ruling, determination, or order of the commission appealed from; and shall also be accompanied by affidavit of the party or parties appellant, or of its, his, her, or their agent or attorney, that the appeal is not taken for the purpose of delay, but because the appellant or appellants verily believe that injustice has been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition.

SEC. 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act.

SEC. 41. No public service company, nor any officer, agent, or employee thereof, shall be liable for any penalty or forfeiture, or be subject to any prosecution, on account of demanding collecting, or receiving any rate, fare, or charge for any service or product rendered or furnished by it, or for enforcing any rule, regulation, or practice, when such rate, fare, charge, rule, regulation, or practice is contained in the tariffs and schedules properly filed with the commission, and posted or published as herein provided, and is applicable by the terms thereof at the time to the said service or product rendered or furnished, although such rate may be found by the commission to be unjust, unreasonable, unjustly discriminatory or unduly preferential.

Office Supreme Court, U. S.
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WM. R. STANSBURY
CLERK

Supreme Court of the United States.

October Term, [redacted] No. [redacted] 280

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY,
Petitioners,

v.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

THOS. RAEBURN WHITE,
700 West End Trust Building, Philadelphia, Pa.,
For Respondent.

International, 236 Chestnut St., Philadelphia.

IN THE

Supreme Court of the United States,

October Term, 1924. No. 791.

THE NEW YORK CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,

Petitioners,

v.

THE NEW YORK AND PENNSYLVANIA COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition filed in this case prays the Court to issue its certiorari on the ground that the decision necessarily involves the interpretation of a Federal statute, *viz.:* The Transportation Act, 1920.

Without arguing the question whether this is sufficient reason for granting petitioners' prayer, we respectfully submit that the petition should be dismissed because the decision of the Supreme Court of Pennsylvania was, *inter alia,* placed upon a ground which does not involve the interpretation of any Federal statute.

This Court has repeatedly decided that if the judgment of a State court is based upon two grounds, one involving a Federal question and the other not, and the non-Federal question is independent of the Federal question and is broad enough to sustain the judgment, the judgment does not depend upon the Federal

question and this Court will, unless under extraordinary circumstances (not claimed here to exist) decline to entertain jurisdiction of the case.

Nickel v. Cole, 256 U. S. 222.

A brief reference to the uncontested facts and the opinion of the Supreme Court of Pennsylvania will make clear what has been indicated. This case had its inception before the Public Service Commission of the State of Pennsylvania, in the proceeding referred to in the petition, paragraph twelve, as Complaint Docket No. 3206. The contention of this respondent, The New York and Pennsylvania Company, in that proceeding was that a certain freight rate on coal, moving between two points within the State of Pennsylvania, was unreasonable and unlawful. The proceeding related in part to a rate in effect from March 1, 1920, to September 1, 1920, and therefore during the period of Federal guarantee. The defendants in that proceeding, petitioners here, challenged the power of the State Commission to pass upon the reasonableness or legality of the rate in effect during that period. It was contended that if the commission should assume to find the rate unreasonable or unlawful, this would in effect amount to a reduction of the rate, and it was contended that the State Commission had no power to reduce the rate until after the Interstate Commerce Commission had approved such reduction.

The real basis of this respondent's contention in the proceeding before the State Commission was not merely that the rate then in force was unreasonable, but that it was unlawful in that it had been wrongfully constructed upon a base rate which the commission itself had previously found unlawful.

It appears from the opinion of the Supreme Court of Pennsylvania, and from the record, that this was the fact, and it was the fact. In proceedings held

prior to Federal control, a rate upon coal moving between the same points had been found unlawful by the Public Service Commission, and a reduction had been directed; subsequently, during Federal control, in constructing a rate in obedience to general order No. 28, making a general increase in rates, the petitioners here unlawfully used as the base rate the rate which had been condemned by the Public Service Commission, and subsequently by the Supreme Court of Pennsylvania when the case came before it on appeal from a reparation order.

When, therefore, the petition which began these proceedings was filed before the Pennsylvania Commission, it was claimed that the rate was unlawful not only because unreasonably high, but also because it had been unlawfully constructed.

When these petitioners (respondent in that proceeding) defended by denying the power of the State Commission to hold the rate unlawful or unreasonable, this respondent replied, (1) that the prayer of the petition was not that the rate be reduced but that an unlawful rate be corrected, and that this was not a reduction of a rate within the meaning of the Transportation Act, 1920; (2) that this was a purely intrastate rate, not claimed to have any effect upon interstate rates, and, therefore, that the Transportation Act, 1920, did not apply to it, but that the State Commission had full power to deal with it.

The State Commission decided these issues in favor of this respondent, holding that it had complete jurisdiction over the question, that the rate was unlawful, and too high, and directed that it be reduced. The report of the commission concluded by stating that reparation would be awarded both upon shipments moving during the guarantee period, and upon later shipments, upon presentation of supporting data (Record in Supreme Court of Pa., pp. 9a, 18a.)

Under the Public Service Company Law of Pennsylvania (as is set forth in the opinion of the Supreme Court of Pennsylvania), the losing party in a proceeding before the Public Service Commission may take an appeal to the Superior Court of the State. If he does not take such appeal he is concluded as to all matters decided by the commission. These petitioners did not appeal. It follows that the decision of the commission was final as to its own power over the rate and as to the fact that the rate was unlawful and unreasonably high.

Subsequently, in accordance with the direction contained in the commission's report, this respondent filed a petition asking for reparation, setting forth the proceedings before the commission and alleging the number of tons which had moved during the period when the unreasonable rates were in effect. Reparation was awarded by the commission for shipments moving (1) during the period of Federal guarantee, and (2) for a period of about a year after the Federal guarantee period had terminated. (Record in Supreme Court of Pa., p. 24a.)

Petitioners paid the reparation awarded as to shipments moving after the guarantee period but refused to pay it on shipments moving between March 1, 1920, and September 1, 1920. Thereupon this respondent began a suit in the Court of Common Pleas of Clinton County, Pennsylvania, to recover the amount of the reparation awarded. Defendants in that case (petitioners here) filed an affidavit of defense in which they set up in effect but a single defense, namely: That the commission had no power or authority to make the order of reparation because (it was alleged) it had no power or authority to reduce rates on shipments moving during the guarantee period, without the approval of the Interstate Commerce Commission having been secured. There was no denial of any of the

facts in the statement of claim. The number of tons of coal moving and the rates at which they moved were admitted. Therefore, the only question involved was the power of the commission to award reparation without the approval of the Interstate Commerce Commission having been secured; and this in turn was based upon the claim that the State Commission had no power to reduce the rate without such approval of the Interstate Commerce Commission. To put it another way the defense was that the Pennsylvania Commission had unlawfully reduced the rate without the approval of the Interstate Commerce Commission.

It is apparent that if the State Commission did reduce the rate, such reduction was effected by its decision that the rate in question was unlawfully constructed and unreasonably high in the amount of ten cents a ton, followed (in the same proceeding) by an order or direction that reparation would be awarded when supporting data had been produced.

It therefore seems to us too clear for discussion that, if the defendants in that proceeding disagreed with the conclusion of the commission that it had the power to decree the rate to be unlawful and unreasonably high, without securing the approval of the Interstate Commerce Commission, they should have appealed from the decision of the commission, and that having failed to so appeal, they could not raise the same questions over again in a suit for reparation which was necessary only for the purpose of proving the amount of the shipments, all other questions having already been decided by the commission.

Upon this view of the case the plaintiff in that case (this respondent), took a rule for judgment for want of a sufficient affidavit of defense, which the Court of Common Pleas of Clinton County made absolute. Petitioners thereupon appealed to the Supreme Court of Pennsylvania, and that Court affirmed the judg-

ment of the Court of Common Pleas upon the ground, *inter alia,* that by their failure to appeal from the first decision of the State Commission petitioners had precluded themselves from again raising the questions they sought to raise in the reparation proceedings, and upon the appeal to the Supreme Court.

The opinion of the Supreme Court of Pennsylvania deals principally with this question, and clearly decides that the judgment must be affirmed because petitioners were no longer in a position to raise the questions which they sought to argue.

The opinion also discussed other questions, such as the application of the Transportation Act, 1920, to the shipments in question, but, as already indicated, the first point was sufficient to decide the case, and indeed the opinion of the Supreme Court indicates that it was the principal ground upon which the case was in fact decided.

Even if this Court should be of opinion that the Supreme Court of Pennsylvania misinterpreted the Public Service Company Law of Pennsylvania, or was wrong in its conclusion that the issues presented in the reparation proceeding had been decided in the first proceeding (except in so far as they were conceded), nevertheless the same conclusion would result, for this Court has repeatedly held that even though it might disagree with the decision of the Supreme Court of the State in interpreting a local statute, or in interpreting the issues in a particular case, that the judgment of the State Court will be accepted and that no Federal question is thereby presented.

Enterprise Irrig. Dist. v. Canal Co., 243 U. S. 157, 164;
Howat v. Kansas, 258 U. S. 181, 186;
Nickel v. Cole, 256 U. S. 222.

It is therefore, respectfully submitted that no ground has been laid for the application to the Court to issue its writ of certiorari in this case, and that the petition should be dismissed.

Respectfully submitted,

T. R. WHITE,
For Respondent.

OSTPONED TO MERITS
PR 13 1925

FILED
FEB 18 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

October Term, [redacted] No. [redacted] 230

1925

THE NEW YORK CENTRAL RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

v.

THE NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

Error to the Supreme Court of Pennsylvania.

Motion to Dismiss Writ of Error and Brief in Support Thereof.

THOS. RAEBURN WHITE,
700 West End Trust Building, Philadelphia, Pa.,
For Defendant-in-Error.

International, 236 Chestnut St., Philadelphia.

IN THE

Supreme Court of the United States.

October Term, 1924. No. 791.

THE NEW YORK CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,

Plaintiffs-in-Error,

v.

THE NEW YORK AND PENNSYLVANIA COMPANY,

Defendant-in-Error.

MOTION TO DISMISS WRIT OF ERROR.

Comes now the defendant-in-error, by its counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction.

T. R. WHITE,
For Defendant-in-Error.

BRIEF IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

Section 237 of the Judicial Code as amended (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366, 2 U. S. Compiled Statutes, 1916, para. 1214) provides in part as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ."

We submit that the facts of this case do not bring it within the terms of this statute for two reasons:

(1) There was not drawn in question the validity of any treaty or statute of the United States, or any authority exercised under the United States, or the validity of any statute of, or authority exercised under any state.

(2) The decision of the Supreme Court of Pennsylvania was based in part upon the ground that plaintiffs-in-error were concluded as to the points they sought to raise by their failure to appeal from a former decision of the Public Service Commission of Pennsylvania.

1. THERE WAS NOT DRAWN IN QUESTION IN THIS SUIT THE VALIDITY OF ANY TREATY OR STATUTE OF THE UNITED STATES, OR ANY AUTHORITY EXERCISED UNDER THE UNITED STATES, OR THE VALIDITY OF ANY STATUTE OF, OR AUTHORITY EXERCISED UNDER ANY STATE.

The record which has been filed in this court clearly discloses the correctness of the statement above made. This case had its origin in a complaint to the Public Service Commission of Pennsylvania in a proceeding referred to in this record as Complaint Docket No. 3206. The complaint, which was filed by defendant-in-error related to a freight rate on coal moving between two points within the State of Pennsylvania. The rate was in effect on March 1, 1920, and until after September 1, 1920. The period of Federal guarantee was between these two dates.

The complaint against the rate was not only that it was unreasonably high, but that it had been unlawfully constructed. The record discloses the fact that prior to Federal control, in proceedings before the State Commission, a rate upon coal moving between the same points had been found unreasonable and ordered reduced by the Commission. Subsequently, during the period of Federal control a general increase of rates was made under General Order No. 28. In making the increase of the rate on this particular movement, one of the plaintiffs-in-error, New York Central Railroad Company, unlawfully used as the basis of the new rate the rate which had been condemned and ordered reduced by the Public Service Commission of Pennsylvania, instead of using the reduced rate, which was the lawful one. The necessary result was that the reconstructed rate was too high and out of line with other rates. (R. 7-12)

The complaint against this rate was duly proceeded with before the Public Service Commission of Pennsylvania. Plaintiffs-in-error (both being involved in the rate, as the coal moved over the railroads of both) defended, *inter alia*, upon the ground that the State Commission had no power to pass upon the reasonableness or legality of a rate in effect during the guarantee period. It was contended that if the Commission should assume to find the rate unreasonable or unlawful, this would amount to a reduction of the rate, and that the State Commission could not reduce the rate without the approval of the Interstate Commerce Commission. It was argued that the Transportation Act, 1920, so provided.

Defendant-in-error, the complainant in the original proceeding, contended in answer to this challenge of the Commission's power (1) that the correction of an unlawful rate, as prayed for in that proceeding, was not the reduction of a rate within the meaning of the Transportation Act, 1920, and (2) that the rate in controversy was upon intrastate commerce, not claimed to have any effect upon interstate commerce, and, therefore, that the Transportation Act, 1920, did not apply to it but that the State Commission had full power to deal with it.

The State Commission decided both of these issues in favor of complainant (defendant-in-error); it held that it had complete jurisdiction over the question, that the rate was unlawful and too high, and directed that it be reduced. The report of the Commission concluded by stating that reparation would be awarded upon shipments moving, *inter alia*, during the guarantee period, upon presentation of supporting data (Record in Supreme Court of Pennsylvania, pp. 9a, 18a). (R. 15-18)

Under the provisions of the Public Service Company Law of Pennsylvania, as is set forth by the Supreme Court of Pennsylvania in its opinion, the losing

party to such a proceeding before the State Commission has the right to appeal to the Superior Court of the State, and if he does not so appeal he is concluded as to all issues decided by the Commission. The plaintiffs-in-error did not appeal from the decision of the Commission above recited, and, therefore, its conclusions on the points referred to became final. (2r. 72-74)

Subsequently, defendant-in-error presented a petition to the Public Service Commission of Pennsylvania, asking for reparation on account of shipments which moved during the guarantee period and thereafter, at the rates decided to be unlawful and unreasonably high. No defense to the reparation proceeding, in so far as the same related to shipments moving after September 1, 1920, was offered by plaintiffs-in-error. As to shipments moving during the guarantee period, however (March 1, 1920, to September 1, 1920), plaintiffs-in-error claimed that the Commission had no power to award reparation for the same reasons that they had urged in the former proceeding. The Commission decided that its former decision, from which no appeal had been taken, had concluded these issues, and awarded the reparation prayed for. (2r. 15-18)

Plaintiffs-in-error paid the reparation on shipments moving after September 1, 1920, but refused to pay it on shipments moving during the guarantee period. Defendant-in-error thereupon began suit in the Court of Common Pleas of Clinton County to enforce the order of reparation, alleging the facts above recited. (2r. 4)

Plaintiffs-in-error filed an affidavit of defense in which they alleged for the third time that the Commission had no power to reduce a rate on shipments moving during the guarantee period, and that the order of reparation was void for lack of power to make it. No other defense was set up as the facts regarding the amount of coal which moved, etc., were all admitted (2r. 32)

Defendant-in-error having taken a rule for want of a sufficient affidavit of defense, the Court made the rule absolute and judgment was entered in favor of defendant-in-error. Plaintiffs-in-error thereupon appealed to the Supreme Court of Pennsylvania, and in that court again contended that the Commission was without power to reduce the rate and, therefore, that the order of reparation was void.

The Supreme Court of Pennsylvania decided (1) that plaintiffs-in-error by their failure to appeal from the first decision of the Pennsylvania State Commission were concluded as to the power of the Commission over the rate; (2) that in fact the Commission had exclusive power over the rate because it related to shipments moving exclusively between points within the State of Pennsylvania, and it was not claimed that these rates had any effect upon interstate commerce; (3) that the action of the State Commission was in fact not a reduction of the rate but the correction of an unlawful charge.

It thus clearly appears that the only Federal statute under consideration in any way was the Transportation Act, 1920. It was not decided, nor contended, that this statute was invalid in any particular, nor was there drawn in question the validity of any authority exercised under the United States. The only way in which the Transportation Act, 1920, was drawn into the case was in that plaintiffs-in-error contended that by virtue of the terms of that statute they had the right to charge a certain rate during the guarantee period, whereas defendant-in-error contended that under the terms of that statute they did not have such right where the rate had been found to be unreasonable and unlawful by the State Commission.

The issue thus raised did not draw in question the validity of the statute. It related to the proper construction, not the validity of the statute. It may be,

and perhaps is the case, that the plaintiffs-in-error claimed a right or privilege under the statute, which was denied them under the decision of the state court, but this is no ground for the issuance of a writ of error; it could only be ground for application to this court for a special certiorari.

Nor was there drawn in question in this case the validity of any statute of the State of Pennsylvania, nor any authority exercised under the State of Pennsylvania. No statute of the State of Pennsylvania was under consideration in any way, except the Public Service Company Law, which provided that in case of a decision by the Public Service Commission an appeal must be taken or the parties would be concluded as to issues decided by the Commission. It was not claimed at any stage of the case that this statute was in violation of the Federal Constitution or of any Federal statute. It was not contended that any state statute was in conflict with the Transportation Act, 1920, or any other Federal act.

There was no authority exercised by the State of Pennsylvania which was contended to be contrary to the Transportation Act, or to the Constitution of the United States, in the sense in which the word "authority" is used in the Judicial Code. That of which the plaintiffs-in-error complain is the decision of the Pennsylvania Supreme Court holding that the defendant-in-error was entitled to recover reparation. This decision did not enforce any state statute or uphold any "authority" exercised by state agencies alleged to be in violation of Federal statutes or Constitution. The decision was based in part upon an interpretation of the proceedings before the State Commission as to the issues there involved, and in part upon a construction of the Transportation Act, 1920. It held defendant-in-error entitled to receive reparation because plaintiffs-in-error had not appealed from the decision of the Pub-

lic Service Commission, holding the rate unlawful and also because in the Court's judgment they were entitled to such reparation. In this there was no Federal question entitling plaintiffs-in-error to their writ.

It is submitted that there is no ground whatever for contending that there was involved in this case any question as to the validity of any statute, either state or Federal, or any question as to the validity of any authority exercised under the state or the Federal Governments.

2. The Decision of the Supreme Court of Pennsylvania in This Case Was Based in Part Upon the Ground That Plaintiffs-in-Error Were Concluded as to the Points They Sought to Raise in the Supreme Court of Pennsylvania by Their Failure to Appeal From a Former Decision of the Public Service Commission of Pennsylvania.

It has been repeatedly decided by this court that no Federal question is involved in a case where the decision of the Supreme Court of the state has been placed upon two grounds, one of which does not involve a Federal question, and where the non-Federal ground is independent of the Federal ground and is broad enough to sustain the judgment.

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157;
Minneapolis, etc., Rwy. Co. v. Washburn Lignite Coal Co., 254 U. S. 370;
Howat v. Kansas, 258 U. S. 181.

In the case at bar, as the statement of facts above recited clearly indicates, and as will be seen from an examination of the opinion of the Supreme Court of Pennsylvania, the decision of that Court was placed primarily upon the ground that plaintiffs-in-error had

no standing to raise again the questions which had been decided against them by the Public Service Commission of Pennsylvania, and from whose decision they did not appeal. The questions which were decided by the Public Service Commission were, as already stated (1) that the Commission had the power to deal with the rate in question regardless of any supervisory power of the Interstate Commerce Commission; (2) that the rate was unlawful and unreasonably high, and should be reduced. (Jr. 72-74)

The complaint in the Supreme Court of Pennsylvania was that the Commission had no power to reduce the rate. It is apparent without discussion that if the Commission did reduce the rate, such reduction was accomplished by its determination that the rate in effect during the guarantee period was too high, accompanied by its order that reparation would be granted for shipments moving during that period upon the presentation of supporting data. The Supreme Court of Pennsylvania so viewed it, although plaintiffs-in-error argued that it was the award of reparation upon the presentation of supporting data which reduced the rate. (Jr. 72)

It follows that by the failure of plaintiffs-in-error to appeal from the decision of the Commission, they lost their right to discuss further the Commission's power over the rate, regardless of whether the decision was right or wrong. This is what the Supreme Court of Pennsylvania decided. That it was sufficient ground upon which to rest the case is apparent. The only contention which plaintiffs-in-error made in the Supreme Court was based upon the allegation that the reduction of the rate was in violation of the Transportation Act, 1920, and the Supreme Court having decided that they were not in a position to raise that question, that was an end of the case. That the Supreme Court so considered it is clearly apparent from its opinion.

Even if it should be thought for the sake of argument that the Supreme Court of Pennsylvania was in error in holding that under the local statute plaintiffs-in-error had lost their right to appeal on the points sought to be argued in that court, still no ground is laid for suing out a writ of error; this court has repeatedly decided that on such questions the decision of the state court will be accepted as final.

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157;
Howat, *et al.* v. Kansas, 258 U. S. 181;
Nickel v. Cole, 256 U. S. 222.

It is therefore respectfully submitted that the writ of error should be dismissed.

T. R. WHITE,
For Defendant-in-Error.

FILED
MAR 11 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

October Term, 1925. No. 230.

NEW YORK CENTRAL RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

v.

NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

THOMAS RAEBURN WHITE,
WHITE, PARRY & MARIS,
For Defendant-in-Error.
West End Trust Building,
Philadelphia, Pa.

International, 236 Chestnut St., Philadelphia.

SUBJECT INDEX.

	Page
List of Citations	iii
Statement of the Case	1
Argument	6
I. The Writ of Error Should Be Dismissed Because There Was Not Drawn in Question the Validity of Any Treaty or Statute of the United States or Any Authority Exercised Under the United States or the Validity of Any Statute of or Authority Exercised Under Any State	6
II. The Writ of Error Should Be Dismissed and the Certiorari Refused Because the Decision of the State Court Was Placed Upon Two Grounds, One of Which Did Not Involve a Federal Question, Was Independent of the Federal Question, and Broad Enough to Sustain the Judgment	9
(a) As to the Contention That the Non-Federal Ground is so Interwoven With the Federal Ground as Not to Be an Independent Matter of Sufficient Breadth to Sustain the Judgment	10
(b) As to the Contention That the Decision of the State Court Was so Clearly Erroneous as to Be Arbitrary	17
(1) That the State Court Misunderstood or at Least Misstated the Facts	18
(2) That the State Commission Did Not Reduce the Rate in Case No. 3206, and, Therefore, a Failure to Appeal Therefrom Could Not Have Precluded Plaintiffs-in-Error on the Question as to Whether the Rate Could Be Reduced Without the Approval of the Interstate Commerce Commission	22

SUBJECT INDEX—Continued.

Page

(3) That the Reduction of the Rate Could Not Be Completely Accomplished Until a Reparation Order Had Issued, and That as No Reparation Order Was Issued in Case 3206, an Appeal Therefrom Could Not Have Raised the Question as to the Power of the Commission to Reduce the Rate 32

(4) That the Decision of the State Court That Plaintiffs-in-Error on Their Appeal From the Reparation Order Could Not Again Raise the Question as to the Right of the Commission to Retroactively Reduce the Rate During the Guarantee Period is Contrary to the Former Decisions of the Pennsylvania Courts 34

III. The Transportation Act, 1920, Does Not Provide That a Reduction of Purely Intrastate Rates Which Do Not Affect Interstate Commerce, Must Be Approved by the Interstate Commerce Commission 42

IV. Even if the Transportation Act Should Be Construed to Apply to the Rates in Question, the Reparation Order Was Not a Reduction of the Rate and Therefore Was Not Subject to the Approval of the Interstate Commerce Commission 54

LIST OF CASES CITED.

	Page
Baer Brothers v. Denver & Rio Grande R. R. Co., 233 U. S. 479	8, 24, 55
Bethell v. Demaret, 77 U. S. 537 (10 Wall. 537)	9
Brown v. Union Pacific, 267 U. S. 255	13
Central Union Telephone Co. v. City of Edwardsville (Decided November 23, 1925), 46 Supreme Ct. Rept. 90	14
Enterprise Irrigation District v. Canal Co., 243 U. S. 157	9, 13
First National Bank v. Anderson (Decided January 4, 1926), 70 L. Ed. 171	15
French v. Taylor, 199 U. S. 274	9
Lehigh & New England R. R. Co. v. Public Service Commission, 79 Pa. Superior Ct. 540, 277 Pa. 493	38
Live Oak Water Users' Assn. v. Railroad Commission of California (Decided January 4, 1926), 70 L. Ed. 167	15
Louisville & Nashville R. R. Co. v. Sloss-Sheffield S. & I. Co. (Decided November 23, 1925), 46 Supreme Ct. Rept. 73	8
Newport & Shermans Valley R. R. Co. v. Public Service Commission, 75 Pa. Superior Ct. 28	34
New York & Penna. Co. v. New York Central R. R. Co., 281 Pa. 260	11, 19, 20, 29, 56
New York & Penna. Co. v. New York Central R. R. Co., 267 Pa. 64	35
Nichol v. Cole, 256 U. S. 222	42
Pennsylvania R. R. Co. v. United States Railroad Labor Board, 261 U. S. 72	49
Phila. & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162	9
Southern Electric Co. v. Stoddard (Decided November 23, 1925), 46 Supreme Ct. Rept. 71	13
Southern Pacific Co. v. Railroad Commission of the State of California, 194 Cal. 734, 231 Pacific Rept. 28	55
State of Texas v. Eastern Texas Railroad Co., 258 U. S. 204	50

IN THE

Supreme Court of the United States.

October Term, 1925. No. 230.

NEW YORK CENTRAL RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY,
Plaintiffs-in-Error,

v.

NEW YORK AND PENNSYLVANIA COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

STATEMENT OF THE CASE.

This case had its origin in a complaint to the Public Service Commission of Pennsylvania filed by defendant-in-error against plaintiffs-in-error, in a proceeding referred to in this record as Case 3206. The complaint related to a freight rate on coal moving between two points within the State of Pennsylvania. It was filed prior to March 1, 1920 (the date of release of Federal control), but was directed against the rate which would be in effect on and after March 1, 1920, pursuant to the terms of the Transportation Act, 1920.

The complaint against the rate (omitting those contentions which were overruled by the Commission) was that it was unreasonably high, and was discriminatory as related to other intrastate rates in the same

territory. This complaint was based not only upon the general averment that the rate was excessive but upon the fact that it had been unlawfully constructed during the period of Federal control, so as to bring it out of line with other intrastate rates which had been adjusted in previous proceedings by the Pennsylvania Public Service Commission.

The history of this rate as set forth in the report of the Commission in Case 3206 (Tr. 7) makes this clear. On December 10, 1917, the Pennsylvania Public Service Commission had reduced by 10 cents the rate on the movement of the coal in question from the mines to Lock Haven fixing it at 80 cents per ton (Tr. 8). The only change made in this rate during the period of Federal control was in pursuance of General Order No. 28 (Tr. 11) issued by the Director General providing for a general increase of rates according to a certain formula which permitted certain increases to be added to a base rate, being the rate in force at the date fixed in this order.

The representatives of the plaintiffs-in-error, then acting for and on behalf of the Director General, in applying the formula prescribed by General Order No. 28 to the rate in question, used as the basis not the rate which had been found to be legal by the Public Service Commission of Pennsylvania, as above indicated, but the illegal rate ten cents greater, which had been condemned. The result of using the illegal rate as the basis was to make the resulting rate under General Order No. 28 ten cents greater than other rates to which the formula had been correctly applied, and consequently to that extent out of line with other intrastate rates in that region (Tr. 11, Brief of Plaintiffs-in-error, 81).

Defendant-in-error had filed a complaint with the Interstate Commerce Commission complaining that

the said rate had been unlawfully constructed, but this complaint had not been acted upon at the termination of Federal control.

On June 18, 1920, the Interstate Commerce Commission held that notwithstanding the manner in which the rate had been constructed, it was not unreasonable and sustained it so far as concerns the period of Federal control ending February 29, 1920 (58 I. C. C. 124).

More than a year later, August 16, 1921, the Pennsylvania Commission filed its report (Tr. 7) holding the rate to be unreasonable to the extent of ten cents, in view of the admission that the rate had been unlawfully constructed under General Order No. 28, and thus made ten cents higher in relation to other rates in that region than it had been theretofore, and as had been fixed by the Commission in a previous order. It further found that the burden of proof was upon plaintiffs-in-error to prove the reasonableness of the advanced rate and that the plaintiffs-in-error had not discharged this burden.

The rate in effect on March 1, 1920, was $1.10 per ton for the transportation in question. This rate was increased pursuant to a general order on August 26, 1920, to $1.54 per ton. The decision of the State Commission was that the rate in effect from March 1, 1920, to August 25, 1920, should have been $1 instead of $1.10 per ton, and from August 26, 1920, to September 1, 1920, should have been $1.40 per ton instead of $1.54 per ton (Tr. 11, 12).

The Commission concluded its report by the following sentence (Tr. 12):

> "Upon the presentation of a petition, accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined."

A petition for rehearing was filed and refused, and thereafter the Commission made a supplemental order prescribing the division of the rate between the two carriers and directing them to make effective the new rates (Tr. 14, 15).

Under the terms of the Public Service Company Law of Pennsylvania, to be hereafter referred to, plaintiffs-in-error had the right to appeal from the decision of the Commission and upon said appeal might have raised any matter which had been determined by the Commission in its report. Although the Public Service Company Act of Pennsylvania expressly provides that in case no such appeal is taken the parties shall be concluded as to all matters determined by said report, plaintiffs-in-error took no appeal either from the order fixing rates for the future or from the determination that the rates which had been charged during the period of Federal guarantee were too high in the amounts stated.

Later on defendant-in-error filed a claim for reparation on account of excessive charges which it had paid on coal moving under the rates aforesaid, and reparation was awarded by the Public Service Commission of Pennsylvania (Tr. 15). Plaintiffs-in-error paid the reparation on shipments moving after September 1, 1920, but refused to pay it on shipments moving during the period of Federal guarantee on the ground that the award of reparation amounted to the reduction of a rate which could not be accomplished without the consent of the Interstate Commerce Commission, which had not been obtained.

Thereafter suit was begun in the case at bar in the Court of Common Pleas of Clinton County, Pennsylvania. The suit was based upon the order of reparation; the statement of claim (Tr. 4) recited the facts above specified, attached as exhibits reports of the Commission and the order of reparation, and

averred in detail the number of tons upon which the defendant-in-error had paid excessive freight charges, as to which however there was no dispute.

The plaintiffs-in-error filed affidavits of defense under the Pennsylvania practice (Tr. 22-32), in which, as set forth in the opinion of the Court, they really set up but one defense, *viz.*, the alleged illegality of the order of reparation, on the ground that it was a reduction of a rate which could not lawfully be ordered by the Public Service Commission of Pennsylvania without the consent of the Interstate Commerce Commission. The defendant-in-error took a rule for judgment for want of a sufficient affidavit of defense, alleging that this question had been decided against plaintiffs-in-error in the original proceeding, from which no appeal had been taken, and therefore that the affidavits of defense were insufficient to prevent judgment (Tr. 36-38).

The Court of Common Pleas of Clinton County duly filed its opinion (Tr. 39) in which it held the affidavits insufficient on the sole ground that all the questions raised in the affidavit of defense had been decided against plaintiffs-in-error in the original proceeding, and as no appeal from that proceeding had been taken they could no longer be relied upon. The Court declined to go into the question of the merits of the case (Tr. 46).

From this decision plaintiffs-in-error took an appeal to the Supreme Court of Pennsylvania, which affirmed the judgment primarily on the same ground relied upon by the Court below, namely, that defendant-in-error by failing to appeal from the order of the Public Service Commission in the first proceeding was concluded as to all issues raised in that proceeding, including the question as to whether the rate could be reduced without the consent of the Interstate Commerce Commission.

Motions for reargument having been made and denied, a writ of error bringing the case to this Court was allowed by the Chief Justice of the Supreme Court of Pennsylvania, and an application for a special writ of *certiorari* was filed in this Court. Defendant in error filed a motion to dismiss the writ of error and filed a brief in support thereof, and also filed a brief in opposition to the petition for a writ of *certiorari*. The Court postponed consideration of the motion to dismiss and the application for a writ of *certiorari* until the case should come up on the merits.

ARGUMENT.

I. The Writ of Error Should be Dismissed Because There Was Not Drawn in Question the Validity of Any Treaty or Statute of the United States or Any Authority Exercised Under the United States or the Validity of any Statute of or Authority Exercised Under Any State.

Section 237 of the Judicial Code as amended (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366, 2 U. S. Compiled Statutes, 1916, para. 1214) provides in part as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a

> writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ."

We submit that the facts of this case do not bring it within the terms of this statute.

The order which is complained of, and which it is alleged violates the Transportation Act, 1920, was an order of reparation issued by the State Commission awarding damages to defendant-in-error, because it had been charged illegal and excessive rates during the period of Federal guarantee, *i. e.*, from March 1, 1920, to September 1, 1920.

Plaintiffs-in-error in their brief, page 24, put their case upon the ground that "the reparation order of the Public Service Commission was a statute of or an authority exercised under a state within the meaning of Section 237 of the Judicial Code," and they cite in support of this proposition several cases in this Court.

We deny the correctness of the principle stated. The cases cited sustain the proposition that the order of a State Commission, fixing rates, is an act of the State within the meaning of the Judicial Code, so that if it is contended that it violates the statutes or constitution of the United States it may afford the basis for a writ of error.

It is submitted, however, that a reparation order of a State Commission is not to be considered as the exercise of statutory authority, and cannot, therefore, be made the basis for a writ of error, on the ground that it violates the constitution or laws of the United States. The distinction between an order fixing rates and thus affecting the public generally and a repara-

tion order awarding damages for injuries sustained by a shipper is clearly set forth in *Baer Brothers v. Denver & Rio Grande R. R. Co.*, 233 U. S. 479. We cannot better state the distinction than in the words of the Court (p. 486):

> "That the two subjects of Reparation and Rates may be dealt with in one order is undoubtedly true. Texas & Pac. Ry. v. Abilene, 204 U. S. 426, 446. Robinson v. Balt. & Ohio R. R., 222 U. S. 506, 509. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent future injury to the public."

This distinction was re-asserted by this Court in *Louisville & Nashville R. R. Co. v. Sloss-Sheffield S. & I. Co.* (decided November 23, 1925), 46 Supreme Court Reporter 73, at page 79. It is well settled that an order fixing rates, being legislative or quasi-legislative in character, must be treated as an exercise of authority by the State for purposes of determining whether a writ of error to a decision enforcing said order shall be allowed. But it is equally well settled that a mere decision of a judicial or semi-judicial character is not the exercise of authority by the State, within the meaning of the judicial code.

Plaintiffs-in-error cite no authority to sustain their proposition that a reparation order is the exercise of authority by the State, in this sense, and we submit there is none. On the other hand, there are many cases which hold that the decisions of courts cannot be so treated, except under very extraordinary circumstances, not claimed to be here present.

Bethell v. Demaret, 77 U. S. 537 (10 Wall. 537);
Phila. & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162;
French v. Taylor, 199 U. S. 274, 277.

A reparation order is a mere award of damages to a private individual; it does not decide or assume to decide or establish anything whatever with regard to the public. It is not, and cannot under any theory, as we see it, be construed to be an exercise of statutory authority by a State within the meaning of the judicial code. We, therefore, submit that no basis for the writ of error has been shown and it must necessarily be dismissed.

II. The Writ of Error Should Be Dismissed and the Certiorari Refused Because the Decision of the State Court Was Placed Upon Two Grounds, One of Which Did Not Involve a Federal Question, Was Independent of the Federal Question, and Broad Enough to Sustain the Judgment.

The rule upon which we rely is stated in *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 163-164, in the following language:

> "Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel *in pais* was well grounded. The first was plainly a federal question and the other as plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which

> was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it."

We do not understand plaintiffs-in-error to dispute this rule, but to contend that it is inapplicable to the case before the Court. We submit that this case is a typical one in which the rule should be applied, and that the reasons to the contrary urged by plaintiffs-in-error are not well founded. We will consider these reasons separately in the further discussion of this point.

(a) *As to the Contention that the Non-Federal Ground Is So Interwoven with the Federal Ground as Not to Be an Independent Matter of Sufficient Breadth to Sustain the Judgment.*

It is argued in the brief of plaintiffs-in-error, page 33, that the decision of the Supreme Court of Pennsylvania did not rest even in part upon an independent ground, but that the Federal issue extended to the entire case.

This contention is not well founded, and it is not sustained by the cases cited by plaintiffs-in-error. The first and principal ground upon which the Supreme Court of Pennsylvania decided this case was that under the Pennsylvania statutes plaintiffs-in-error were concluded as to the issue they sought to raise there and here, by their failure to appeal from a former proceeding before the Public Service Commission. The first seven and one-half pages of the Court's opinion

(281 Pa. 260-268) deal exclusively with this question The Federal question was briefly discussed in approximately one page near the conclusion of the Court's opinion; while the Court incidentally expressed a judgment upon the Federal question it again returned to the first ground at the very end of its opinion and distinctly placed its conclusion thereon. Its conclusion may be stated in its own language (281 Pa. p. 266):

> "We are of opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval."

And at the very end of the opinion, 281 Pa. 269, the following:

> "As we have stated, no appeal by any party who felt aggrieved was taken from the final order as required by our acts of assembly. We are convinced that judgment for the plaintiff was properly entered by the court below, and, the assignments of error are overruled, without separate discussion."

The Public Service Company Law of Pennsylvania (Act of July 26, 1913, P. L. 1374) provides as follows, Art. VI, Section 31:

> "Whenever the Commission shall make any rule, regulation, finding, determination or order under the provisions of this act, the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act."

We do not see how it can be successfully controverted that if the Commission in Case 3206 did reduce

the rate during the guarantee period, within the meaning of the Transportation Act, 1920, the failure to appeal therefrom necessarily concluded the right of the plaintiffs in error to again raise the question. We think it is too clear for extended discussion that a decision that the failure to appeal from the decision in Case 3206, prevented plaintiffs in error from further contesting the point decided by the Commission in that case constituted an independent ground broad enough to sustain the judgment of the Supreme Court of the State.

If this be not so, it could always be contended that a local statute requiring an appeal within a particular time would not stand in the way of afterwards reraising the Federal question although no appeal was taken; this amounts to a contention that in no case is it necessary for a litigant to follow the requirements of the local statutes regarding procedural matters, if he raises a Federal question. The decisions of this Court clearly demonstrate that this is not the law and the cases cited by plaintiffs in error do not sustain their contention. They all relate to cases in which the Federal question was necessarily decided by the Court in order to reach its conclusion. We concede that if the Court below could not have decided the case without rejecting the argument based upon the constitution or statutes of the United States, then the Federal question must be held to extend to the entire case.

But the cases cited have no bearing upon the question now before the Court, which is whether a decision by the Supreme Court of the State that a litigant had lost the right to further contest a Federal question by failing to appeal from a former judgment, is broad enough to sustain the final decision. Even a decision that a litigant is estopped to raise the Federal question has been held to rest upon an independent ground which when ruled by the Court below will deprive this

Court of jurisdiction. *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 165. On this point the Court said:

> "It is not urged, nor could it well be, that as a ground of decision the estoppel is not broad enough to sustain the judgment."

This rule has been reasserted in more recent cases in this court.

Brown v. Union Pacific, 267 U. S. 255.

In *Southern Electric Co. v. Stoddard* (decided Nov. 23, 1925), 46 Supreme Ct. Rep. 71, this Court held that the judgment of the Appellate Division of the Supreme Court of New York was not reviewable on writ of error under the following circumstances. A decision had been made by the Appellate Division on a question involving the Constitution of the United States. Plaintiff-in-error could have appealed the case as of right to the Court of Appeals of New York, but did not do so; instead it requested a certificate from the Appellate Division that a question of law was involved which ought to be reviewed by the Court of Appeals, but that certificate was refused. Thereafter no application was made to the Court of Appeals. The writ of error was dismissed on the ground that the plaintiff-in-error had "failed to make proper application to the State Court of final resort."

This case is in principle similar to the case at bar. We contend here that the writ should be dismissed because plaintiffs-in-error did not pursue their remedy by appeal to the Superior Court of the State, and our contention here is fortified, as it was not in the case cited, by the judgment of the highest court of Pennsylvania, that by such failure to appeal plaintiffs-in-

error lost their right to further contest the Federal question.

In *Central Union Telephone Co. v. City of Edwardsville* (decided Nov. 23, 1925), 46 Supreme Ct. Reporter 90, plaintiff-in-error had raised certain constitutional questions in a lower court, and from the decision of the lower court had taken an appeal to the Appellate Court of Illinois, an intermediate court of appeal. The Appellate Court certified the case to the Supreme Court of the State on the ground that constitutional questions were involved which deprived it of jurisdiction. The Supreme Court remanded the case to the Appellate Court on the ground that while constitutional questions were involved in the case other questions also were involved, and an appeal having voluntarily been taken to the Appellate Court it had jurisdiction. The Appellate Court thereupon affirmed the judgment of the Court below. Plaintiff-in-error then obtained a *certiorari* from the Supreme Court of the State and removed the case to that court. The Supreme Court, however, declined to review the constitutional questions on the ground that plaintiff-in-error by voluntarily appealing to the Appellate Court, when it was entitled to appeal directly to the Supreme Court on the constitutional questions, had waived the constitutional questions. A motion was made in this court to dismiss the writ of error on the ground that the judgment of the State court had been based upon an independent ground not involving a Federal question. This Court sustained that view and dismissed the writ; contentions were made on behalf of plaintiff-in-error that this Court should determine for itself whether the Federal questions had been waived and should not hold that they had been under the circumstances of that case. This Court, however, rejected this argument

and sustained the State practice, and the decision of the Supreme Court based thereon. It was contended there, as in the case at bar, that no such decision had previously been made by the Supreme Court of Illinois, and that the decision was arbitrary. This Court, however, although conceding that the question had not previously been decided, held that

> "It is not, however, a forced or strained interpretation to hold that 'cases . . . in which the validity of a statute or construction of the Constitution is involved' include validity, under or construction of, both Constitutions. When so declared by the State court it should bind us, unless so unfair or unreasonable in its application to those asserting a Federal right as to obstruct it. This is no such case."

See also

> Live Oak Water Users' Assn. v. Railroad Commission of California (decided Jany. 4, 1926), 70 L. ed. 167.

Our opponents have cited *First National Bank v. Anderson* (decided Jany. 4, 1926), 70 L. ed. 171 (see p. 41 of brief of plaintiffs-in-error). The case is no authority for their position, but a word is required as to their discussion of the case. Plaintiffs-in-error in their brief (p. 41) italicize one of the points urged by defendant-in-error in the case cited, which was stated by this Court in its opinion as follows:

> "(b) the bank has not exercised the local statutory right of appealing from the action of the county officers in imposing the tax."

In quoting from this Court's opinion, plaintiffs-in-error stop with the sentence, "The second ground is not better," from which the inference might be drawn

that the second ground referred to is that stated in italics on the preceding page. That this is not the case is apparent from reading that part of the Court's opinion immediately following the sentence quoted by plaintiffs-in-error. The paragraph in question, of which plaintiffs-in-error quoted only the first sentence is as follows:

> "The second ground is not better. The supreme court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here. In cases coming from state courts this court's power and concern are specially directed to rulings made or refused on Federal questions. Murdock v. Memphis, 20 Wall. 590, 638, 22 L. ed. 429, 445; Bi-Metallic Invest. Co. v. State Bd., 239 U. S. 441, 444, 60 L. ed. 372, 374, 36 Sup. Ct. Rep. 141."

It is evident that what this Court meant by "the second ground" was not the point stated in the italicized portion of the Court's recital of the contentions urged, but the contention of defendant-in-error that the decree of the Court below was correct because the suit was not one in which relief could be had in equity although the Court below had held to the contrary. This Court dismissed this contention because the Court below had treated the case as one cognizable in equity, and its judgment on that point was controlling. The case is no authority for the position assumed here by plaintiffs-in-error.

We therefore submit that the Federal question was not so interwoven with the non-Federal question as to destroy its independent character. The ground of the decision on the point now under discussion was entirely independent of the Federal question and broad enough to sustain the judgment.

(b) *As to the Contention that the Decision of the State Court was so clearly Erroneous as to be Arbitrary.*

We, concede the rule, frequently announced by this Court, that if the point relied upon by the Court below was a mere device in order to escape the decision of a Federal question, and thus to deprive plaintiffs-in-error of the right to appeal to this Court, it cannot have this effect. In such case we concede that this Court will, and should, assume jurisdiction. But no such case is presented here.

In support of their contention that the decision of the State court was obviously erroneous and arbitrary, plaintiffs-in-error urge four points:

(1) That the State Court misunderstood or at least mis-stated the facts.

(2) That the State Commission did not reduce the rate in Case No. 3206, without the approval of the Interstate Commerce Commission, and, therefore, a failure to appeal therefrom could not have precluded plaintiffs-in-error on the question as to whether the rate could be reduced without the approval of the Interstate Commerce Commission.

(3) That the reduction of the rate could not be completely accomplished until a reparation order had issued, and that as no reparation order was issued in Case 3206, an appeal therefrom could not have raised the question as to the power of the Commission to reduce the rate.

(4) That the decision of the State Court that plaintiffs-in-error on their appeal to the Supreme Court of the State from the reparation order could not again raise the question as to the right of the Com-

mission to retroactively reduce the rate during the guarantee period is contrary to the former decisions of the Pennsylvania courts.

We will consider each of these contentions in order:

(1) That the State Court Misunderstood or at Least Mis-stated the Facts

Although it is alleged in the brief of plaintiffs-in-error in the head note of their argument, page 43, that the decision of the Court below discloses "several serious errors as to facts" only one alleged error is pointed out. It is said page 43: "The language of the State Court's opinion indicates that the issue which it understood to be involved in this case related to the order of the State Commission in Docket No. 3206 fixing the rate of $1.40 to be charged after August 1921." At the conclusion of their argument on this point, page 44, plaintiffs-in-error say:

> "Therefore, we submit that a decision of the State Court that the failure of the plaintiffs-in-error to appeal from the decision and order of the State Commission was a waiver of the defense asserted in this suit, is not to be accepted as final by this Court when it appears that the Court's decision was made on the theory that the defense sought to put in issue the legality of the order fixing the rate of $1.40 when such is far from the fact and when this case involves only the rate of $1.10 as to which the Commission made no order in Docket No. 3206."

In the first place it should be pointed out that plaintiffs-in-error have themselves made an inadvertent mis-statement of fact when they say that only the rate of $1.10 is involved in this proceeding. This is not the case. The reparation which was awarded was at the rate of 10c per ton (being the difference between

$1. and $1.10), from March 1, 1920, to August 25, 1920, and at the rate of 14c per ton (being the difference between $1.40 and $1.54), from August 26 to September 1, 1920. See order of the Public Service Commission, Tr, 19, and statement of the case in plaintiffs-in-error's brief, page 10-11. The case therefore related both to the $1.10 rate and the $1.40 rate.

A further answer to the contention urged is an examination of the Court's opinion as a whole rather than the brief excerpts which are quoted by plaintiffs-in-error on pages 43-44 of their brief. Plaintiffs-in-error quote a sentence from 281 Pa. 264, as indicating that the Court erroneously thought that the case before the Court was an appeal from an order fixing the rate of $1.40 to be charged for the future. That the Court had no such misunderstanding is so clear from an examination of its opinion that it is hard to understand how the contention could be made. The case before the State Court was an appeal from the decision of the Court of Common Pleas of Clinton County, enforcing a reparation order. The Court expressly points this out pages 267-268.

Further, on the very page from which the excerpt above referred to is cited (264) the Court recites that the State Commission had held "that the reasonable pay for shipments from March 1st to August 26th, should be one dollar, and for the period thereafter, $1.40."

The Court then explains that an appeal might have been taken from the decision of the Commission regarding the reasonableness of the rate and immediately afterwards follows the sentence quoted in plaintiffs-in-error's brief:

> "From the order fixing the reasonable rate no such appeal was taken, and the appellants are now debarred from complaining of the ruling."

When this sentence is read in its context it becomes clear that it had reference to the order of the Commission determining what the reasonable rate was during the periods mentioned as well as the reasonable rate for the future.

That the excerpts contained in the brief of plaintiffs-in-error are misleading when separately quoted is even more clear when the second quotation is examined (Brief of Plaintiffs-in-error, page 44). Plaintiffs-in-error have omitted that part of the quotation which would explain the sentence which they italicise and rely upon. What the Court said at 281 Pa. 267, including those sentences quoted by plaintiffs-in-error as indicating that the Court thought it was dealing only with the order of $1.40 for the future, is as follows:

> "The record shows that, after having debated the relative positions of the parties, as hereinabove indicated, and discussed the evidence, the Commission made this finding and definitive order: 'Upon all of the facts of record, we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad, for the period March 1, 1920, to August 25, 1920, both inclusive (this being the guarantee period), should be $1 per 2240 pounds, and effective August 26, 1920, the date of the 40 per cent. increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2240 pounds, Respondents will be directed, by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40,' being the rate here complained of. This order was made without any qualification, and, as indicated, without any sug-

gestion of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal. At that time this appellant was notified by the Commission that, upon the presentation of a petition, accompanied by supporting data, reparation would be awarded for freight charges paid in excess of the rates herein determined, further emphasizing the determination of the Commission that the matter was exclusively within its own control."

There can be no doubt that reference by the Court to the "rate here complained of" meant not only the $1.40 rate but the $1.00 rate, which together constituted the rate, though applicable to different periods.

This also disposes of the contention urged at various points that because the Court refers to "order" it must have meant the order fixing the rate for the future. Plaintiffs-in-error contend that what was done by the Court in Case 3206 could not be considered an "order" except as it related to a future rate. Whatever the plaintiffs-in-error may think the action of the Commission was, there is no doubt that the State Supreme Court considered it to be an order. In that portion of its opinion above quoted, it expressly refers to the finding of the Commission as to the reasonable rates during the guarantee period as "a definitive order." There is, therefore, no room for arguing that where the Supreme Court of the State referred to the order fixing the rate, it meant an order relating only to a future rate at a later date.

It is submitted that the above references to the Court's opinion show beyond any question that it made no error of fact in the matter alleged by plaintiffs-in-error.

(2) That the State Commission Did Not Reduce the Rate in Case No. 3206, and, Therefore, a Failure to Appeal Therefrom Could Not Have Precluded Plaintiffs-in-Error on the Question as to Whether the Rate Could be Reduced Without the Approval of the Interstate Commerce Commission.

It is contended that the State Commission in Case 3206 did not decide the issue raised in the affidavits of defense. The only issue so raised as set forth in the opinions of the Court of Common Pleas of Clinton County and the Supreme Court of the State, and as is conceded in the brief of plaintiffs-in-error, page 46, was that the order of reparation was void because the State Commission had no power to reduce a rate without the consent of the Interstate Commerce Commission. It is argued that this reduction was not made in Case 3206 from which plaintiffs-in-error failed to appeal, but in the later reparation proceedings.

In order to bring clearly before the Court at this point our view as to when the reduction of the rate took place, it is necessary to refer to the report and order made by the Commission in Case 3206. The report (Tr. 7) found that the just and reasonable rate for the period from March 1, 1920, to August 25, 1920, should have been $1 instead of $1.10 per ton which was charged, and that the just and reasonable rate from August 26, 1920, to September 1, 1920, should have been $1.40 instead of $1.54 per ton, which was charged. This report was concluded by the following sentence:

> "Upon the presentation of a petition, accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined."

It would seem without argument that this finding and determination by the Commission was the reduction of the rate, if it be conceded that finding a rate to be unlawful is a reduction within the meaning of the Transportation Act, 1920.

It is argued, however, by plaintiffs-in-error that the action of the Commission in Case 3206 was not a reduction of a rate, because it is said that the Commission made no *order* except that the carrier should publish and make effective the rate of $1.40 thereafter.

It is, of course, true that the formal order of the Commission had relation to the future, but it finally and conclusively determined retroactively the amount of the reasonable rate during the guarantee period.

We are unable to understand the emphasis placed upon this point by plaintiffs-in-error, in view of the fact that the statute which provides for an appeal from the decision of the Public Service Commission does not provide merely for an appeal from an *order* made by the Commission, but from "any rule, regulation, finding, determination or order." (See brief of plaintiffs-in-error, p. 31.) There can be no possible doubt that the decision of the Commission that the rate which had been charged during the guarantee period was unreasonable and too high was a finding or determination of the Commission, even if it should be conceded for purposes of argument that it was not an "order." The distinction which is made in the brief of plaintiffs-in-error appears to have no real substance. Our position is that the Commission made a finding or determination that the rate charged during the guarantee period was too high, and that the rate which should have been charged was a lower figure which it fixed. If there was any reduction in the rate this was the reduction, and in view of the express provisions of the statute if plaintiffs-in-error objected to this finding either because they thought the rate was not too

high or because they thought the Commission had no power to reduce it, they should have taken an appeal to the Superior Court of the State within the time provided by the statute.

Of course, the reduction of a rate after the period during which the rate was charged has expired could only be made retroactively, but we do not follow the argument of plaintiffs-in-error when they say that this reduction was not accomplished until defendant-in-error had filed a claim for reparation, had proven the amount of the shipments to it and had been awarded a sum to cover its loss. It seems to us too clear for discussion that the determination of the Commission as to what the reasonable rates should have been constituted the reduction, if reduction there was.

A further consideration which leads to the same conclusion that it was the order of the Commission in Case 3206 and not in the reparation proceedings which reduced the rate, is the difference in the nature of the orders which were made in the two proceedings.

When in the Transportation Act the reduction of a rate was forbidden without the consent of the Interstate Commerce Commission, Congress must have had in mind an order of a Commission legislative in character, effective not only upon a certain individual but upon the public at large. No other action could be reasonably argued to mean the reduction of a rate. As pointed out in *Baer Bros. v. Denver & Rio Grande R. R. Co.*, 233 U. S. 479, reparation orders and orders fixing rates are entirely different; one is quasi-judicial and the other quasi-legislative; one relates only to the injuries sustained by a particular shipper, the other relates to the public. The fact that the shipper is entitled to damages by reason of having paid excessive rates or for other reasons has no necessary relation to the damages suffered by any other shipper, and does not involve the interests of the public in any way.

It is, therefore, respectfully submitted that these considerations lead inevitably to the conclusion that it was the order of the Commission in Case 3206, fixing the rates both prospectively and retroactively, and not the mere award of reparation to defendant-in-error, which operated as a reduction of the rate in question.

But it is further argued that plaintiffs-in-error did not contend in Case 3206 that the State Commission had no power to reduce the rate without the consent of the Interstate Commerce Commission, and therefore this issue was not raised. If in fact the Commission decided the point, it matters little whether or not plaintiffs-in-error raised it; but the record plainly shows that they did raise it.

In its report the Commission said (Tr. 8-9):

"The respondents (plaintiffs-in-error) argue that in view of the decision in Northern Pacific Railway Co. v. North Dakota, 250 U. S. 135, there is no question that during the period of Federal control the rates in issue were the lawful rates; and since they were the lawful rates on February 29, 1920, they continue to be the lawful rates by virtue of Section 208 (a) of The Transportation Act, and that the provisions of the Pennsylvania Public Service Company Law do not render them illegal.

"The Transportation Act of 1920, Section 208 (a), establishes the intrastate rates as well as the interstate rates to be effective upon the termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates 'shall continue in force and effect until thereafter changed by State . . . authority.' Congress enacted the (fol. 15) laws which made possible the assumption of control and the operation of the railroads of the country and logically must pro-

vide the legislation for the return of those properties to their owners.

"Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners."

In its subsequent report on the question of reparation, the State Commission used the following language (Tr. 16):

"They (plaintiffs-in-error) do, however, contest both the validity of the Commission's decision in case No. 3206 and its power to award reparation in the present case with respect to shipments moving between March 1, 1920, and August 31, 1920, and these are the issues to be considered in this brief. . . . It is the defendants' position, first, that since the rates attacked were in effect on February 29, 1920, they continued to be lawful rates for this transportation and that the decision of this Commission in case No. 3206, in so far as it purported to effect a reduction in the rates of the defendants for transportation between March 1, 1920, and September 1, 1920, was void because not approved by the Interstate Commerce Commission and could, therefore, give the complainant no right to reparation; and, Second, that an order in this case requiring the defendants to pay reparation on such shipments would, in effect, be an order reducing the rates charged and, without the approval of the Interstate Commerce Commission, would be of no effect under the section of the Transportation Act above quoted.

"The first of these objections that the rates in effect on March 1, 1920, and during the six months

following were lawful rates was advanced by respondent in the original proceeding (P. U. R. 1921 E, p. 80, *supra*), wherein we determined the reasonable rates. There is no question but that the rates were the lawful rates in the sense that they were 'a collectible rate, or one that may be sued for.' Suburban Water Company v. Borough of Oakmont, 268 Pa. 243. The position that the rates in effect on March 1, 1920, were not reviewable by this Commission on complaint is without support in law."

It will be noted that plaintiffs-in-error contended "that the decision of this Commission in 3206 *in so far as it purported to effect a reduction in the rates of the defendants for transportation between March 1, 1920, and September 1, 1920,* was void because not approved by the Interstate Commerce Commission." (Italics ours.)

It is thus clear that plaintiffs-in-error did contend that the Commission in Case 3206 had reduced the rate, and further contended that such reduction was void because it had not been approved by the Interstate Commerce Commission. On this point the State Commission further said (Tr. 18):

"As to the contention that the rate determined by this Commission effects a reduction in a rate prior to September 1 1920, and that the approval therof by the Interstate Commerce Commission has not been had, it must be borne in mind that our report and order were issued on August 16, 1921, which made it impossible to secure prior approval and that the Interstate Commerce Commission (March 13, 1922) concluded that it is without jurisdiction to pass upon claims for reparation arising from intrastate movements during the guaranty period."

When suit was begun on the reparation order in the Court of Common Pleas of Clinton County plain-

tiffs in error filed affidavits of defense which are iden tical in form and raise the question of the power o the Public Service Commission to make the repara tion order. In these affidavits of defense is containe the following averment (Tr. 23 24):

> "This defendant avers that, while the Publi Service Commission purported to find that th just and reasonable rate for the through move ment of coal from the mines in the Munson an Hawk Run Districts to Lock Haven, Pennsylvania for the period from March 1, 1920, to August 2 1920, was $1.00 per ton, and from August 26, 192 to September 1, 1920, was $1.40 per ton, neverthe less the commission's finding as to a just and rea sonable rate during the period from March 1, 192 to September 1, 1920, was nugatory and of n avail, and the said finding is of no effect and i violation of Section 208 (a) of the Transportatio Act, 1920. This defendant further avers tha while the finding, as stated above, was made b the Public Service Commission in the reports re ferred to, it entered no order at that time wit respect to the matter, and thereafter issued n order save and excepting the order of reparatio which is the subject of this suit, and which i shown in the Plaintiff's Statement of Claim, con stituting pages 26 and 27 thereof, and designate 'Exhibit G.'"

This averment clearly alleges that the finding o the Commission in Case 3206 was void because it wa in violation of the Transportation Act, 1920. It wil be noted that it does not allege that the findin of the Commission in Case 3206 was merely ineffectiv because not as yet approved by the Interstate Com merce Commission, as now contended, but that it wa absolutely void, thus clearly sustaining the statement by the Commission in its reports and by the Stat Court in its opinion that the question as to the powe

of the Commission to make the order was challenged at that time and decided by the Commission contrary to the arguments submitted by plaintiffs-in-error.

As to the issues raised in Case 3206, the Supreme Court said (281 Pa. 264-266; Tr. 91-92):

> "It is important to remember that, in the proceeding before the state board on the second complaint (3206), which passed upon the disputed charges fixed during federal control, the appellants here asserted that the Public Service Commission had no power to reduce the rates between March 1, 1920, and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then, the railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction, and claimed such order was 'nugatory and of no avail.' The issue was there squarely joined as to whether the commission had power within itself to hear and determine the reasonableness of a rate during the guarantee period, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants denied any authority to alter the charges in any manner until the federal tribunal had acted or authorized it to be done. . . . Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3206, and squarely passed upon by the commission, is evidenced not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the court. It was only after our decision in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493, that a change of attitude by the defendants took place."

This is all that the record shows on this subject. Plaintiffs-in-error rely on their unsupported assertion,

not sustained by their own affidavits filed of record, that they did not challenge the power of the Commission to deal with the rate; but the record is against them. Irrespective of this, however, the question was decided, and it was their duty to appeal if they were not satisfied with the decision.

It is very clear that after the State Commission issued its order on August 16, 1921, in Case 3206 no consent of the Interstate Commerce Commission could have been had, even if it had been sought, on intrastate rates in effect during the guarantee period more than a year previous, in view of the ruling above referred to. It was, of course, known at that time that the Interstate Commerce Commission had in fact approved the rates which the State Commission had condemned for the period ending February 29, 1920, but no consent had been sought or obtained as regards the reduction of rates thereafter. Plaintiffs-in-error had argued that the Commission had no power to reduce the rate without the approval of the Interstate Commerce Commission and that an order of reduction if made would be void.

Under these circumstances, if plaintiffs-in-error desired to contest the Commission's ruling and determination that it had jurisdiction to reduce the rates during the guarantee period, and further to contest its conclusion that such rates should be and were thereupon retroactively reduced regardless of any action by the Interstate Commerce Commission, it was the duty of the plaintiffs-in-error to take an appeal to the Superior Court of the State as the statute provides. On that appeal all questions which had been investigated and determined by the Commission in Case 3206 would have been reviewed by the Superior Court. This would have included the question whether the State Commission had the power to reduce the rate

during the guarantee period without the approval of the Interstate Commerce Commission.

The theory of the Public Service Company Law of Pennsylvania is that all questions which have to do with the reasonableness of a rate under discussion shall be finally settled and ended at the first hearing before the Commission. It is this hearing which fixes and determines the rights of the public, including the complaining shippers and any others who may be interested.

If any shipper desires reparation he files a separate and later proceeding in which he avers and proves his damage. The carrier may deny the damage but he may not again raise any question as to the reasonableness of the rate.

A consideration of the statutes and the practice prevailing in Pennsylvania, clearly shows that no issues can be raised in the reparation proceeding except issues of fact as to the amount of the shipments which moved under the excessive tariffs, and sometimes the question whether the freight has actually been paid by the complainant and the loss not passed on to others. It was never the intention that the issues which had been settled and determined in the first proceeding should be threshed over again in the second proceeding. This is fully demonstrated by cases from the courts of Pennsylvania to be cited in the next section.

It necessarily follows that the reduction of the rate was made at the first proceeding in Case 3206 and not in the reparation proceedings thereafter.

The contentions that the State Commission did not reduce the rate in Case 3206, and, that failure to appeal therefrom could not have precluded the plaintiffs-in-error from raising the point in further litigation are not sustained.

(3) That the Reduction of the Rate could not be Completely Accomplished until a Reparation Order had Issued, and that as no Reparation Order was Issued in Case 3206, an Appeal Therefrom could not have Raised the Question as to the Power of the Commission to Reduce the Rate.

It is argued in the brief of plaintiffs-in-error (p. 50, *et seq.*) that the issue as to the power of the State Commission to reduce a rate during the guarantee period *could not* have been raised upon an appeal from the decision of the State Commission in Case 3206.

This, of course, is based mainly on the contention already discussed that the action of the Commission in that proceeding was not a reduction of the rate, although this argument is clearly contrary to the position which the plaintiffs-in-error assumed in the case itself. It is further argued in the brief, however, page 51, that an appeal from the decision of the Commission in Case 3206 would have been deemed premature if taken prior to the issuance of a reparation order, on the theory that at any time prior to the issuance of such order the approval of the Interstate Commerce Commission to the reduction might have been secured. It is argued that the rate was not completely reduced by the order of the Commission in Case 3206, but only reduced subject to the approval of the Interstate Commerce Commission.

This argument, however, is not based on facts. At the time when the decision of the Commission in Case 3206 was made, in August, 1921, the guarantee period had long since expired; the Interstate Commerce Commission had announced its refusal to assume jurisdiction of any applications for approval or disapproval of reparation orders, and obviously no such approval

could then be secured. This is entirely aside from the fact already set forth that the power of the State Commission was challenged to deal with the rate at all, and that it announced and exercised its full control over the rate on the ground that it was one which related to purely intrastate commerce, with which the Interstate Commerce Commission had nothing to do. Whether this decision was right or wrong, it was a final decision, and if plaintiffs-in-error had taken an appeal at that time, they could have corrected any errors made by the Commission in so holding. In such case if the Supreme Court of the State had refused them relief, they would undoubtedly have had an appeal to this court. It is because they did not follow that procedure that they lost their remedy.

It is stated and argued at several points in the brief of plaintiffs-in-error that they did not object to the order issued by the Commission in Case 3206, so far as it related to the future, and they emphasize that as the Commission's order related only to the future there was nothing from which to appeal. This view of the case, however, ignores obvious facts. The Commission found and determined that the rate during the guarantee period was unreasonable and that a lower rate should have been charged. There was nothing to prevent the plaintiffs-in-error from appealing to the State Court, alleging error in the Commission's ruling in holding that the rate should be reduced during the guarantee period, but not objecting to its ruling as applied to the future. On such an appeal they could, of course, have raised every point they now seek to raise, including the lack of power of the Commission to reduce the rate. To hold that plaintiffs-in-error could ignore their right of appeal and thereafter raise the identical issue in subsequent litigation, notwithstanding the plain provisions of the Pennsylvania statute to

the contrary, would be to hold that a litigant is never required to follow the procedure prescribed by State statutes, if he has or claims to have a Federal issue upon which he relies.

(4) That the Decision of the State Court That Plaintiffs-in-Error on Their Appeal From the Reparation Order Could Not Again Raise the Question as to the Right of the Commission to Retroactively Reduce the Rate During the Guarantee Period is Contrary to the Former Decisions of the Pennsylvania Courts.

It is argued in the brief of plaintiffs-in-error (p. 52, *et seq.*) that the decision of the Supreme Court of Pennsylvania in the case at bar, holding that the issue as to the power of the Commission to reduce the rate should have been raised by an appeal from the original proceeding in Case 3206, is contrary to the former decisions of that Court.

This contention is wholly without basis. An examination of the cases which are cited in support of the proposition advanced by the plaintiffs-in-error shows that everyone of them was decided contrary to the argument which is made.

The first case cited by plaintiffs-in-error (p. 53) is *Newport & Shermans Valley R. R. Co. v. Public Service Commission*, 75 Pa. Superior Court 28. It is stated that the Court held in the case cited that "an appeal would not lie to review a decision of the State Commission that rates collected in the past had been unreasonable and that the plaintiff was entitled to reparation."

This statement as to what was decided in the case cited is misleading. The appeal was not from a decision of the State Commission that rates collected had been unreasonable but from an order of the Commission awarding reparation, the decision as to the rea-

sonableness of the rate having been made in a former proceeding. The statute plainly provides, as the opinion in that case states, that there can be no appeal from an order of reparation, but that the carrier if it wishes to contest the order may simply refuse to pay and in that event the plaintiff must proceed by suit in the courts. In such a case the carrier can defend on the ground that the shipments had not moved as claimed, or that the plaintiff had not suffered loss by reason of such payments, but it cannot in such proceeding again raise the questions which were decided in the former proceeding, and this, of course, includes all questions as to the reasonableness of the rates.

In the case cited the appeal was quashed because the statute prohibited such an appeal, and that is all there is in the case. While it is not so stated in the brief of plaintiffs-in-error, it would seem as if the inference is sought to be drawn that whereas in the case at bar the Supreme Court of Pennsylvania held that an appeal should have been taken from the decision of the Commission, that in the case cited it was held to the contrary, that an appeal could not be taken. What has already been said clearly shows that the cases are wholly different. Under the statutes in force in Pennsylvania an appeal does lie from a proceeding to determine the reasonableness of rates, but an appeal does not lie from an order of reparation. The case cited in the Superior Court was of the latter character, whereas the ruling in the State Court in the case at bar referred to an appeal of the former character.

The second case cited by plaintiffs-in-error on this point (p. 54 of their brief) is *New York & Pennsylvania Co. v. New York Central R. R. Co.*, 267 Pa. 64. This case does not support in the least the arguments which are advanced here by plaintiffs-in-error; on the contrary it fully sustains the position assumed by the defendant-in-error.

The case cited was an appeal by the carrier from a decision in the Court below enforcing an order of reparation. In the suit on the reparation order, and again in the Supreme Court of the State, the carrier attempted to raise again the questions which had been determined in the first proceeding before the Public Service Commission, holding certain rates to be unreasonable. In that case, as in the case at bar, the Supreme Court clearly held that this could not be done; that it was the duty of the carrier, if he contested the decision of the Commission as to the reasonableness of the rate, to take an appeal from this finding or determination; after there had been a final decision as to the reasonableness of the rate, the reparation proceedings might follow but upon such reparation proceedings questions as to the reasonableness of the rate could not be again raised.

That the decision of the Supreme Court in the case cited was in all respects in accord with its decision in the case at bar is clearly apparent from the following excerpt from its opinion, pages 69-71:

> "At the hearing by the commission, defendant raised three objections to the complaints: (1) That they were not in proper form. This was overruled. (2) That, since the complaints were regarding a joint rate, though 'made up of two separately established locals or proportionals,' the Pennsylvania Railroad Company should also have been made a party to the proceedings. Upon this point the commission said: 'The (local) portion of this through rate imposed by the Pennsylvania is not questioned by either the complainants or the respondents'; and again: 'It is practically conceded by both respondent and complainant that the Pennsylvania local rate is reasonable. . . . To compel the Pennsylvania Railroad Company to appear would be of no particular purpose. . . . Whenever a through rate is adjudged unreasonable, and it is made up of separately imposed pro-

portionals or locals, it may be reduced to a reasonable rate by an order directed against the proportional or local found to be unjust or unreasonable,' citing Interior Iowa Cities Case, 28 I. C. C. 64. It therefore decided 'The through rates complained against . . . are for the reasons above stated held to be unjust and unreasonable, . . . (and hence) an order will be issued directing the respondent to strike from its tariff the increased locals or proportionals which are the subject of this complaint, . . . and to restore the rates of respondent in effect immediately prior thereto.' A rehearing asked for by defendant was refused, an order made in accordance with this ruling, and from it defendant did not appeal. No order of reparation was then made because the machinery of the law, so far as it relates to this branch of the investigation, looks only to an inquiry into the reasonableness of the rates objected to, and hence, as will hereinafter be pointed out, the statute requires reparation to be applied for, and granted or refused in a later proceeding.

Defendant not having refunded to plaintiff the amount paid in excess of the reasonable rate as thus determined, plaintiff filed with the commission a petition setting forth the foregoing facts and the damages it had suffered, and asked for an order of reparation. Defendant attempted to reraise the question decided in the first proceeding, but this it could not then or thereafter do, not because the facts and law there laid down were *res adjudicata* in the usual acceptation of that term, but because, by article VI, section 31, of the act, defendant's failure to appeal made all those rulings 'conclusive upon all parties affected thereby.' Hence, as between these parties, it was conclusively determined the complaints were in form sufficient to comply with the statute, the Pennsylvania Railroad Company was not a necessary party to the proceedings, and defendant's proposed new rates were unreasonable. Had an appeal been taken, most of the matters now complained of would have been considered and

> determined by the Superior Court, for section 24 of the same article requires it then to decide whether or not 'the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law.' "

The third case cited in the brief of plaintiffs-in-error (p. 54) in support of their contention that the decision in the case at bar is out of harmony with former cases in Pennsylvania is *Lehigh & New England R. R. Co. v. Public Service Commission*, 79 Pa. Superior Ct. 540; 277 Pa. 493. In that case the rate under consideration was an intrastate rate, but it was contended that a reduction of the same would constitute unjust discrimination against interstate commerce on the line of the carrier (79 Pa. Superior Ct. 547). The Superior Court held, in accordance with this contention, that the rate was such a one as would affect interstate commerce, and, therefore, that it was subject to the joint jurisdiction during the guarantee period of the State and Interstate Commerce Commissions. The Supreme Court, accepting this finding as final, dealt only with certain questions, upon which an appeal was allowed from the Superior Court. It appeared that the Interstate Commerce Commission upon hearings duly had before it, had reduced a rate from 40 cents to 25 cents a ton, and that thereafter the State Commission on a similar complaint made the same reduction, enforcing during the guarantee period after March 1, 1920, the same rate as had been fixed by the Interstate Commerce Commission as aforesaid. The carrier appealed to the Superior Court from the decision of the State Commission reducing the rate. The action of the State Commission was treated throughout, and was repeatedly referred to in the opinion of the Court, as the reduction of a rate. The

Supreme Court used the following language with regard to the scope of the appeal from the order determining the reasonable rate (p. 499).

> "The appeal to the Superior Court opened all challenged findings relating to the contested rate; the final decree was not the only matter to consider. There were included not only the basis for the rate from December 17th onward, but retroactively the basis for the finding that, from December 17, 1921, back to March 1, 1920, the rate was unjust if the commission so found it. Questions on the findings are not to be taken up piecemeal,—that is for the future under this appeal, and the reasonableness of the past rate on an appeal from a reparation award, though in the latter the commission may limit recovery to any damage actually sustained. See Mr. Justice SIMPSON's opinion in N. Y. & Pa. Co. v. N. Y. C. R. R. Co., 267 Pa. 64. The Superior Court did not err in considering all questions presented to the commission or arising under the complaint."

It is respectfully submitted that the language above quoted could not more plainly sustain the position assumed here by the defendant-in-error. It is clearly stated that on appeal from the decision of the State Commission the questions are not to be taken up piecemeal, but that "the reasonableness of the past rate," as well as the rates for the future, are to be opened and considered. This ruling is a direct decision to the effect that in the case at bar the legality of the State Commission's decision determining the unreasonableness of the past rate should be considered upon an appeal from the Commission's decision thereon, and not thereafter in connection with a suit on a reparation award.

It is argued in the brief of plaintiffs-in-error, page 55, that the Court held that "the appeal in the case cited was premature to raise the objection sought to

be interposed to the granting of reparation, and that the parties should await the issuance of a reparation order, and should test the validity of that order by a suit for its enforcement."

Undoubtedly the Court did say that upon an appeal from an initial hearing before the Commission, questions as to the right of reparation could not be raised, and there is no doubt about this, and never has been. The first proceeding is not intended to determine the right to reparation nor the amount thereof. It does, however, determine all questions as to the reasonableness of the rates or the reduction thereof, and these questions cannot be again raised in reparation proceedings. The language in the opinion of the Superior Court of Pennsylvania italicized by plaintiffs-in-error (brief, p. 56) we submit has no application whatever to the case at bar; on the contrary the case itself, as is shown by the quotation from the Court's opinion above given, sustains the position assumed by defendant-in-error in all particulars.

Incidentally it is interesting to note that the Supreme Court of Pennsylvania expressly referred to the action of the State Commission, in retroactively fixing the reasonableness of the rates during the guarantee period, as a reduction of the rate (p. 502).

This is what we contend in this case. The action of the Commission in Case 3206, in retroactively fixing the reasonableness of the rate during the guarantee period, was a reduction of that rate, and if plaintiffs-in-error objected to such reduction, they had their remedy by appeal, which they failed to follow.

It is, therefore, respectfully submitted that the effort of plaintiffs-in-error to prove that the decision of the State Supreme Court in the case at bar was out of line with its former decisions is not only shown to be unfounded, but that the contrary has been demonstrated beyond possibility of question.

A final point is made in the brief of plaintiffs-in-error (pp. 58-59) that the effect of the decision of the Court below is to hold that a reparation order is conclusive proof of the facts stated therein. It is said that "the Court below has held in effect that if carriers fail to appeal from a decision of the State Commission that reparation will later be awarded, the State Commission's decision becomes conclusive and the reparation order subsequently issued is not open to attack."

This statement is entirely unwarranted by anything in the Court's opinion. It has not been so held. It has been held that the failure to appeal from the first proceeding before the Commission concludes the parties as to all matters decided in that proceeding, but it has never been held that the carrier could not make a defense to reparation proceedings, or to a suit upon a reparation order on any ground except those decided by the Commission in the first proceeding, such as, for example, that the shipments claimed had not actually moved, or that the plaintiff had not in fact suffered damage by the payment of the excessive charges.

It is, therefore, submitted that the plaintiffs-in-error have entirely failed in their contention that the decision of the State court was so clearly erroneous as to be arbitrary. To succeed, they must of course convince this Court that the decision of the State Court was not only clearly wrong but that it had no reasonable basis. There can be no successful claim of this under the facts here present. The rule should therefore be applied that a writ of error does not lie where the State court has placed the decision of the case upon a ground independent of the Federal question, which independent ground is broad enough to sustain the judgment, and the writ of error should be dismissed.

As it is well settled that a petition for a writ of *certiorari* will be denied where the judgment of the Court below has been placed in part on an independent

ground which is broad enough to sustain the judgment, Nichol v. Cole, 256 U. S. 222, we submit for the reasons above discussed that the petition for a writ of *certiorari* should be denied.

III. The Transportation Act, 1920, Does Not Provide That a Reduction of Purely Intrastate Rates, Which Do Not Affect Interstate Commerce, Must Be Approved by the Interstate Commerce Commission.

Section 208 (a) of the Transportation Act, 1920, reads as follows:

> "208. (a) All rates, fares and charges, and all classifications, regulations and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission."

It will be observed that the act applies *inter alia*, to rates which, on the termination of Federal control, were "in effect on the lines of carriers subject to the Interstate Commerce Act." The question, therefore, arises as to what rates were intended; whether all rates, interstate and intrastate, or whether the act was intended to apply to interstate rates and to intrastate rates only in so far as they affect interstate commerce.

It is respectfully submitted that the latter construction is the correct one; there is no claim here that

the rates under discussion on coal moving entirely within the State of Pennsylvania have any effect upon interstate commerce or interstate rates, therefore the case is not one where the approval of the Interstate Commerce Commission was required.

We base our position primarily upon the terms of the act. Our argument can be best understood by examining the statute in its complete form as reported in United States Statutes at Large, Volume 41, part 1, page 456, etc.

The point we make is that Congress, when dealing with carriers in most of the sections of the Act under titles I, II and III refers to them as carriers under Federal control or simply as carriers without limitation, but in three instances, including Section 208 (a), it carefully limits the carriers affected by the section to those which are "subject to the Interstate Commerce Act." It is our contention that this indicates an intention by Congress to limit the application, *inter alia,* of Section 208 (a) to rates, and fares charged in interstate commerce or in intrastate commerce when and only when such rates and charges affect interstate commerce.

Thus Section 200 (a), 41 U. S. Stat. at Large, 457, provides that at a certain date fixed the President shall relinquish control "of all railroads and systems of transportation then under Federal control." Section 204, page 460, relates to reimbursement for deficiencies incurred during Federal control; "carrier," as used in this section, is defined to mean any railroad "engaged as a common carrier in general transportation." Section 206 (a), page 461, provides a method whereby causes of action may be prosecuted arising out of the operation of any such carrier. Paragraph (c) of this same section, page 462, provides for the filing of complaints for reparation on account of damage claimed to have been caused by reason of the col-

lection or enforcement of illegal fares, etc., "including those applicable to . . . intrastate traffic," making it clear, if it were not otherwise evident, that the Act was intended in these sections to apply to intrastate commerce and traffic. Section 207, relating to the refunding of the carrier's indebtedness to the United States, and Section 209, relating to the guarantee of the income of carriers after the termination of Federal control, are similarly unlimited in application. They apply to intrastate as well as interstate carriers.

In Sections 208, 210 and 300, however, very different language is used. Section 208 (a), page 464, has been quoted above. Its application is limited to rates, fares and charges, etc., which "on February 29, 1920 are in effect on the lines of carriers subject to the Interstate Commerce Act." In Section 208 (b) there is the same limitation of the carriers affected; the paragraph relates to divisions of joint rates, fares, charges, etc. Section 210 relates to new loans to railroads during the transition period following the termination of Federal control. This section also is limited in its application to "carriers by railroad subject to the Interstate Commerce Act." Title 3, entitled "Disputes between carriers and their employees and subordinate officials," relates to the Railroad Labor Adjustment Board and certain other matters. Section 300 under this title defines "carrier" as used in said title to mean "any carrier by railroad subject to the Interstate Commerce Act" with certain exceptions.

Our contention is that Congress when dealing with rates to be charged and with loans to be made after the termination of Federal control and when dealing with the settlement of disputes between carriers and their employees intended to limit the application of the statute to carriers engaged in interstate commerce or in intrastate commerce to the extent that it affected

or interfered with interstate commerce and to rates, fares, charges, etc., applicable to such commerce.

If this is not the case then it may well be asked why did Congress introduce a limitation where there was none before. If it meant to include all rates in effect on the lines of all carriers subject to Federal control, why did it not say so? There can be but one answer to this question.

The expression used in the three sections last above referred to is "carriers subject to the Interstate Commerce Act." An expression identical in meaning is used all through Title 4 of the same act, 41 U. S. Stat. at Large, p. 474. This title is called "Amendments to Interstate Commerce Act" and all through it constantly occurs and recurs the expression "carriers subject to this Act." The word "carriers" in Section 400, page 474, is carefully defined to mean carriers engaged in interstate transportation and it is specifically provided that it shall not apply "to the transportation of passengers or property . . .wholly within one state." In short, Title 4, passed as a part of the same enactment as the section under consideration, is clearly limited in its application to interstate commerce and to intrastate commerce so far as it may affect interstate commerce and all through this title, as we have said, the expression "carriers by railroad subject to this Act" is used. The expression used in Sections 208, 210 and 300 of the act, is "carriers subject to the Interstate Commerce Act." This difference of phraseology was adopted obviously because the earlier part of the Transportation Act, was not a part of the Interstate Commerce Act, whereas Title 4 was. With this explanation the two expressions are identical in meaning and, on the face of it, it would seem incontrovertible that they mean the same thing, especially as they are used in the same statute.

It necessarily follows that the rates, fares and charges, which in Section 208 (a) are made subject in certain particulars to action of the Interstate Commerce Commission, include only fares and rates which are charged in interstate commerce or in intrastate commerce to the extent that such fares and rates may prove discriminatory as related to interstate rates or may otherwise affect the same.

In spite of this apparently clear meaning of Section 208 (a), however, plaintiffs-in-error argue that by reason of certain phraseology contained in it, it must be construed to apply to purely intrastate rates.

The first point made, brief of plaintiffs-in-error, page 69, is that the section provides that the rates shall continue until changed by Federal or State authority. It is said that a State authority could not in any event change an interstate rate and, therefore, the use of this expression was meaningless, unless it was intended that the Act should apply to intrastate rates.

This argument will not bear examination. There is no doubt that the Interstate Commerce Commission has authority over intrastate rates, fares and charges in so far as they may be interwoven with interstate rates so as to affect the interstate rate structure. In such cases the State authority would certainly act in the first instance with regard to the intrastate rate, and if no objection were made by the carrier or others, this action would be final. If, however, it were contended that the State rates were interwoven with the interstate rates, then a case would be presented for application to the Interstate Commerce Commission; but the State authority would act in the first instance, and this explains the use of the expression "until thereafter changed by Federal or State authority" which is made the basis of the argument.

It is further alleged in the brief of plaintiffs-in-error, page 69, that the expression "all rates, fares

and charges'' is an indication that *all* rates are being included, not merely those charged in interstate commerce or in intrastate commerce which affects interstate commerce.

But the expression ''all rates, fares and charges'' is subject to the limitation immediately following; that is, to those ''which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act.'' We, therefore, must return to the first point raised as to the meaning of these words, and in view of the precise similarity of expression used here and in Title 4 of the act which admittedly relates only to interstate commerce, there seems no room for doubt that it was meant to limit the application of the act to such rates, fares and charges as relate to interstate commerce or intrastate commerce under the circumstances mentioned above, but that it was not intended to apply to commerce purely intrastate and not affecting interstate commerce.

It is argued that it must have been the intention of Congress to maintain both State and interstate rates at the high level at which they were found on March 1, 1920. This does not follow. It was undoubtedly the intention of Congress to continue the rates, fares and charges specified in Section 208 (a) at said high level and to prevent them from being reduced except with the approval of the Interstate Commerce Commission, but an argument that Congress must have meant to include *all* rates because it had guaranteed the income of the railroads, is not convincing; Congress may have believed, and undoubtedly did believe, that the maintenance of the rate structure of the country, in so far as it related to interstate rates and intrastate rates where they affected interstate rates, was sufficient to yield revenue adequate for the needs of the railroads; and it doubtless thought, and rightly, that it would be

unwise for Federal control over State rates to be continued after Federal control had ended.

The quotation from the Congressional Record cited by plaintiffs-in-error, pages 72 and 73 of their brief, is not convincing. Remarks made by members of the House or Senate can never override the plain meaning of the statute, but in this case the language referred to does not sustain the position of the plaintiffs-in-error. The brief cites, page 73, a remark by a member in charge of the bill that the State rates would be continued "until the proper State authorities can pass upon them, otherwise they would go back to pre-war rates."

This is a clear statement by this member that, in his opinion, the State authorities could reduce State rates, yet the argument made here by the plaintiffs-in-error is that the State authorities cannot reduce the State rates, but that such reduction can only be made with the approval of the Interstate Commerce Commission.

The omission of the proposed amendment quoted in the brief, page 73, is not significant. If it had been inserted it might have been construed to prevent the Interstate Commerce Commission from exercising control over intrastate rates in any case, even where they affected interstate rates. As this was not intended, the amendment was wisely omitted.

Our position is that the language limiting the application of Sections 208, 210 and 300 differing in this respect from the language of other sections of the first three titles of the Transportation Act, 1920, is a clear indication that Congress did not intend that these sections should have unlimited application, but that they should apply only to the extent indicated above.

As we have said, the language limiting the application of Sections 210 and 300 is the same as that in

Section 208. So far as we have been able to ascertain, Section 210 has not been construed by the courts. Section 300, however, was considered by this Court in *Pennsylvania Railroad Co. v. United States Railroad Labor Board*, 261 U. S. 72. While the point was not expressly before the Court, there can be no doubt that the Court assumed that Section 300 has application only to disputes arising between carriers in interstate commerce and their employees; in other words, that it has no application to purely intrastate carriers and their employees. The statement of the case, which the report states was made by the Chief Justice, opens as follows (p. 72):

> "This case involves the construction of Title III of the Transportation Act of 1920, c. 91, 41 Stat. 456, 469. The Title provides for the settlement of disputes between railroad companies engaged in interstate commerce and their employees, and as a means of securing this, it creates a Railroad Labor Board and defines its functions and powers."

Later in the statement of the case appears the following sentence (p. 76):

> "Section 301 makes it the duty of carriers, their officers, employees and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of an interstate commerce carrier due to a dispute between the carrier and its employees, and further provides that such disputes shall be considered and if possible decided 'in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute.' "

The opinion of the Court contains the following sentences (p. 79):

> "It is evident from a review of Title III of the Transportation Act of 1920 that Congress

> deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. . . . The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault."

We think it is clear from the above that this Court is of the opinion that Title III of the Transportation Act applies only to carriers engaged in interstate commerce.

The language which describes the scope of Title III. is identical with the language which describes the scope of Section 208. In both, the carriers affected are limited to those which are "subject to the Interstate Commerce Act." It would seem, therefore, to be incontrovertible that as this Court construes Title III. to relate only to carriers engaged in interstate commerce, the same construction must be applied to Section 208.

In this connection the attention of the Court is respectfully directed to its decision in the case of *State of Texas v. Eastern Texas Railroad Company*, 258 U. S. 204, in which paragraphs 18, 19 and 20 of Section 402 of the Transportation Act were under considera-

tion. Paragraphs 18, 19 and 20, 41 U. S. Stat. at Large, pages 477, 478, relate to the extension or abandonment of lines of railway and require said abandonment *inter alia,* to be subject to the approval of the Interstate Commerce Commission. The language of the section so far as regards the scope thereof is as follows, page 477:

> "No carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

It will be observed that the Act applies to railroads "subject to this Act." This expression, as has already been pointed out, is identical in meaning with the expression used in Section 208 (a) which limits the application of that section to rates "in effect on the lines of carriers subject to the Interstate Commerce Act." It would seem, therefore, as if the scope of the two sections should be the same, especially as they occur in the same enactment.

The facts were that the Eastern Texas Railroad Company, pursuant to authority granted to it by the Interstate Commerce Commission, was proposing to abandon its intrastate railroad. The case involved an effort by the State of Texas to prevent this from being done. It was argued that the Transportation Act, 1920, should not be construed to regulate the construction, acquisition or abandonment of lines exclusively engaged in intrastate commerce. As against this argument it was contended on the part of the company that the said Act did provide for the abandonment of such roads upon the consent of the Interstate Commerce Commission, which had been secured. The road was engaged partly in intrastate commerce and partly

in interstate and foreign commerce. It was conceded that so far as its operations related to interstate and foreign commerce, Congress had the power to give the Interstate Commerce Commission authority over it and had done so. It was contended, however, that in so far as the operations of the road related only to intrastate commerce, Congress had not acted and had no power to act. The Supreme Court used the following language (258 U. S., pp. 217 and 218):

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction their validity will be undoubted. Of such a situation, this court has said, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' United States v. Delaware & Hudson Co., 213 U. S. 366, 407-408.
>
> "Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulations of intrastate commerce, save such as is involved in the right-

ful exertion of the power of Congress over interstate and foreign commerce. Minnesota Rate Cases, 230 U. S. 352, 418; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563. And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done.

"These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."

It is respectfully submitted that the force of the reasoning of the Court in this case compels a similar decision in the case at bar. The language of the section construed is so precisely similar to that under consideration in this case that a different conclusion seems impossible, especially as the two sections of the statute were part of the same enactment and were approved at the same time.

The only distinction which we think can be made between the case cited and the case at bar is that those sections of the Transportation Act which were under consideration in the Texas case purport to affect the operations of the carriers for an indefinite period and if they relate to purely intrastate commerce there was a more serious question as to their constitutionality than there would be in the case at bar if Section 208 (a) were construed to apply to intrastate rates during the guarantee period. We concede that it may be reasonably argued that Congress would have the power to maintain intrastate rates for a limited period in re-

turning the country from a war to a peace basis. We do not concede that Congress would have this power but we do concede that a much more reasonable argument could be made in favor of it than in favor of the permanent power of the Interstate Commerce Commission to control the abandonment of intrastate railroads.

But notwithstanding this possible distinction, we submit that where an expression contained in one section of the Statute has been construed in a certain way, substantially identical language in another section must be construed in the same way unless there is some compelling reason to the contrary, which we do not find in this case.

We, therefore, conclude on this branch of the argument that Section 208 (a) of the Transportation Act, 1920, does not require the consent of the Interstate Commerce Commission to the reduction of an intrastate rate which has no effect upon interstate commerce, and therefore regardless of any other point in the case, the judgment of the Court below was correct and should be affirmed.

IV. Even if the Transportation Act Should be Construed to Apply to the Rates in Question, the Reparation Order Was Not a Reduction of the Rate and Therefore Was Not Subject to the Approval of the Interstate Commerce Commission.

We have already argued that the reparation order was not a reduction of the rate, but was a quasi-judicial decision awarding damages to a shipper. We advanced this argument in connection with our contention that it was the action of the Commission in Case 3206 which reduced the rate, and that plaintiffs-in-error should have taken an appeal from that decision if they desired to further contest the fixing of the rates, either prospective or retroactive.

We now make the same point, but approach it from a different angle. Section 208 (a) of the Transportation Act provides that certain rates shall not be reduced unless such reduction is approved by the Interstate Commerce Commission. We submit that an award of reparation in an action for damages by a shipper is in no case a reduction which the Act makes subject to the approval of the Interstate Commerce Commission.

If Congress had intended to make all quasi-judicial decisions of State Commissions awarding damages for injuries sustained during the guarantee period subject to appeal to the Interstate Commerce Commission, it would have said so in plain language.

What the Act was evidently intended to reach was a decision by a Commission affecting the public; that is an order concerning rates. Certainly it is no such case where all the Commission does is to award damages to a particular shipper. This question is very carefully discussed in *Southern Pacific Company v. Railroad Commission of the State of California,* 194 Cal. 734, 231 Pacific Rept. 28. The Court in a situation similar to that in the case at bar reached the conclusion that it was not the intention of the Transportation Act to make orders for reparation subject to the approval of the Interstate Commerce Commission. This was said in view particularly of the decision of this Court in Baer Bros. v. Denver & Rio Grande R. R. Co., 233 U. S. 479, discussed, *supra.*

In this connection the attention of the Court is directed to the fact that the order of reparation was not made until long after the guarantee period had expired, and prior to that time the Interstate Commerce Commission had held, and we think rightly, that it had no jurisdiction to approve or disapprove orders of reparation made in such cases. (See conference ruling

of the Interstate Commerce Commission, Tr., p. 18.)

In view of the ruling of the Interstate Commerce Commission that it had no jurisdiction to approve or disapprove such orders of reparation, shippers who had suffered damage by reason of unlawful charges which had been collected during the guarantee period would be without redress if plaintiffs-in-error are correct in holding that such awards cannot be enforced without the approval of the Interstate Commerce Commission. This view seems to us to be unreasonable.

The view of the Supreme Court of Pennsylvania as to the legal effect of what was done by the State Commission is in another particular well worthy of consideration. After pointing out that the rate complained against was unlawful because it had been illegally constructed under General Order 28, upon a base rate which had been condemned as illegal, the State Supreme Court says (281 Pa. 269):

> "The State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly illegal premise, and make it conform to one determined as reasonable prior to federal control."

This view of the matter seems to us to be sound. It is not to be supposed that Congress intended that rates which had been unlawfully constructed, and in fact fraudulently constructed, as this one was, should be continued without power in some proper authority to correct the illegality and to enforce the proper rate. Correction of a wrong done in this manner cannot under any theory of the case be deemed to be a reduction of a rate.

It was, therefore, not subject to the approval of the Interstate Commerce Commission.

We submit that the decision of the Court below on the merits was correct, and if this Court should assume jurisdiction of the case that the judgment should be affirmed.

Respectfully,

T. R. WHITE,
For Defendant-in-Error.

SUPREME COURT OF THE UNITED STATES.

No. 230.—October Term, 1925.

New York Central Railroad Company and Pennsylvania Railroad Company, Plaintiffs in Error, *vs.* New York and Pennsylvania Company.	In Error to the Supreme Court of the State of Pennsylvania.

[April 26, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought in a court of Pennsylvania to recover the amount of alleged excess charges paid by the defendant in error for the carriage of coal in commerce within the State, and ordered by the Public Service Commission of Pennsylvania to be repaid by way of reparation. A judgment on the order in favor of the defendant in error was affirmed by the Supreme Court of Pennsylvania. 281 Pa. 257. The charges in question were for shipments between March 1, 1920, and September 1, 1920, the six months following the termination of federal control of the railroads. The rates charged were those that were in effect on February 29, 1920. By § 208(a) of the Transportation Act, 1920, (February 28, 1920, c. 91; 41 Stat. 456, 464) prior to September 1, 1920, no such rate could be reduced unless the reduction was approved by the Interstate Commerce Commission, the six months concerned being the period during which the United States guaranteed certain income to the railroads by § 209. The Interstate Commerce Commission has not approved any reduction and therefore it is plain that the State Commission had no authority to intermeddle with the rates that it undertook to cut down. It is true that regulating rates and awarding reparation are different matters. But the prohibition in the statute covers either method of reducing the pay received by the roads. The language of the statute and the reasons for the enactment too clearly apply to intrastate as well as to interstate rates, to admit debate. *Missouri Pacific R. R.*

Co. v. *Boone,* March 22, 1926. Whether the rates were right, or were wrong as the State Court thinks, they could be changed only in one way.

It may be that some of the questions before us would be proper matters for a writ of error, but as the rights asserted under the statute of the United States are more fully open upon a writ of certiorari we shall consider the case upon the last mentioned writ.

The State Courts were of opinion that the plaintiffs in error had waived their rights by their failure to appeal from a decision on an earlier complaint to the State Commission in which that Commission held that a lower rate was reasonable and stated that upon presentation of a petition accompanied by the supporting data reparation would be awarded for freight charges paid in excess of the rates thus fixed. Whether the federal rights asserted were lost in this way is open to examination here. *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246. *Ward* v. *Love County,* 253 U. S. 17, 22. *Davis* v. *Wechsler,* 263 U. S. 22, 24.

In our opinion the failure to appeal from the former order is no bar. We do not undertake to review the decision of the Supreme Court as to state procedure, but if the Railroads were too late to argue their case before that Court they are not too late to argue it here. There was no order in the former hearing before the State Commission that the Railroads could have brought before us. This is the first moment when they have had a chance to raise what we regard as a perfectly clear point, as it is the first moment when their rights have been infringed. There now is an order which is in the teeth of the statute. It would not be reasonable to hold that they are precluded from getting the protection that this Court owes them, by their having failed to go as far as they now learn that they might have gone in a previous state proceeding which did not infringe their rights and which could not be brought here. "The judgment under review was the only final judgment . . . from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review." *Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S. 207, 214. *Smith* v. *McCullough,* March 22, 1926.

Writ of certiorari granted.
Writ of error dismissed.
Judgment reversed.

Mr. Justice SUTHERLAND took no part in the consideration or decision of this case.